

Fourth Edition



Homo Dignita

Theory and Practice of Human Rights

Zafarullah Khan

PAKISTAN LAW HOUSE

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Dedicated to:

The Wretched of the Earth

Preface

The ideals of human rights have fascinated me since my childhood. In agrarian environment where I was born, the society was strictly hierarchal. The children of landowners, like me, had to maintain a distance from the children of the tenants. Even the elder tenants or servants were treated like subjects. However, my educated and humane father taught me different norms. He inculcated in my tender mind the respect for equality of human beings. He would invariably quote this famous Persian exhortation: 'Whatever you don't like for yourself, do not like for others'. This seed of respect for human rights have been germinating in me since then and fully bloomed during my Lincoln Inn days.

The Human Rights movement as such is a relatively new phenomenon though the Holy Quran declared more than fourteen hundred years ago: 'We have honoured the Children of Adam and carried them on land and sea, and provided them with good things, and preferred them greatly over many of those We created' (The Quran: 17:70) and Omar-bib-Khattab (d. 644) thundered, 'Why have you enslaved the people when they were born by their mothers free?'. Rousseau truly lamented in 'Social Contract (1762) that 'Man is born free, but he is everywhere in chains'. However, the ideals of the human rights now have become a significant part of modern human consciousness, a universal discourse, a potent rhetoric and aspiration.

This book presents a broad analysis of human rights concepts, processes, institutions and systems. It examines the human rights achievements that now form part of national and international legal, political and moral landscape. The central object of the book is to have a standard textbook on human rights that could educate readers in a proper context. The focus is on legal materials exploring intricate relationship among law, politics and morality. It relies on resolutions, debates, reports, decisions and other acts of inter-governmental assemblies, commissions and committees as well as of non-governmental organisations. The book quotes case law also because the role of the courts is central in protecting human rights and developing human rights ideals.

Part 1 of the book deals with the introduction of basic concepts, evolution and theories of human rights and their relationship with international law;

Part II explores the United Nations human rights regime;

Part III deals with UN enforcement system and its relationship with NGOs; Part IV explains regional human rights instruments;

Part V discusses special interests of human rights; and

Part VI explains human rights as enshrined in the Constitution of Pakistan.

The book was first published in 2001. In the 2nd edition (2003), new chapters on International Law and the rights of child were added. In the third edition (2007) chapters on Convention against Torture, International Labour Standards and Cairo Declaration on Human Rights in Islam were added. Now the book has been thoroughly updated in the light of recent developments and in addition to beefing up the earlier chapters, ten new chapters (Two, Three, Four, Six, Twelve, Thirteen, Fourteen, Fifteen, Twenty, and Twenty-One) have been added; thus, making the book almost a new one.

First and foremost, I would like to thank God Almighty for giving me the strength, knowledge and opportunity to undertake and complete this study. I gratefully acknowledge the research assistance of Sharafat Ali and Mahrukh A. Mughal for this edition. I would like to express my very great appreciation for Sahebzada Ghulam Mohyudin for painstakingly proof reading the entire draft. My acknowledgement would be incomplete without thanking the biggest source of my strength, my family: the blessings of my mother and love and care of my children.

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Part I
HUMAN RIGHTS IN CONTEXT

Chapter One

INTRODUCTION TO HUMAN RIGHTS

1. Definition of human rights

Every person has life and dignity. The norms and principles of human rights have been gradually developed by humanity as a means to ensure that the life and dignity of every human being, without any distinction whatsoever, is properly and equally respected and developed. In other words, it means that a human being will be freely able to fully develop and utilize human inherent qualities (i.e., intelligence, talents and conscience) and satisfy its physical, emotional and spiritual needs.

Life and dignity give an individual a sense of real value and worth. However, human life and dignity are not individualistic, exclusive and isolated concepts, these are rather an integral part of our common human existence. The existence of human rights norms and their enforcement mechanisms demonstrate that human beings are aware of each other's value and worth.

Human rights enable humans to genuinely respect and co-exist with each other; in other words, these are not only abstract notions to be expressed, requested or demanded but to be properly and adequately respected and be fully responsible for their rightful observance.

The human rights that apply to an individual also apply to every member of humanity. The denial, abridgement and disrespect of human rights is not only an individual and personal deprivation or tragedy, but also seriously ushers in creation of palpable conditions of social, economic and political unrest, sowing the real seeds of violence and conflicts, inter and intra individuals, families, communities, societies and nations.

Basically and essentially, human rights are the 'claims' of an individual for such favourable conditions and friendly environment that is essential for the fullest actualization of the innate characteristics which the kind nature has very graciously bestowed upon it as an individual human being.¹

It means that there are certain inalienable rights, which are inherent in a human being by virtue of its being human and that they are absolutely imperative to ensure the life and dignity of every person as a human being irrespective of one's race, colour, religion, nationality, language, sex or any other factor whatsoever.

All 'claims' of a person, (e.g., freedom to live as one desires to or to do whatever one wishes to do or to get whatever one likes to get), cannot be regarded as human rights. Only those 'claims', which are essential for the development of one's life and dignity and are thus recognized as such by the 'society' at large, constitute human rights.

This fact however, needs to be, properly appreciated and fully recognized that all conceptually recognized human rights are not legally binding, enforced or enforceable; therefore, one must distinguish between what is morally or academically accepted as human right and what constitute 'legal right' enforced through established administrative and judicial processes in a particular society at a particular point of time.

¹C Naseema, Human Rights and Educational and Pedagogical Concepts, Kanishka Publishers, New Delhi, 2002, P1

The word 'right' in the generic sense means that it is something to which we are entitled. This word in plain English usage not only means a 'lawful entitlement' but also a 'just entitlement'. This 'just entitlement' can be constituted due to various factors such as law, religion, philosophy, custom or morality. The law, however, causes and guarantees such entitlements or rights and without a binding legal framework, these rights cannot be enforced.

Human rights are almost gospel truth in modern world. They have become a great ethical touchstone to be used to measure a government's treatment of its people and treatment of people by the people; they set a universal standard that can be used to judge any individual, community, government and society. Human rights do provide an acceptable and universal measure with which individuals or governments from one part of the globe may gauge the norms followed by other individuals, communities, governments or societies. Without such fully universal human rights touchstones, one will be left simply trying to claim that one's own action is better than somebody else's.

A broad universal consensus has emerged on an international moral code prescribing and describing certain rights and duties for all human beings on the basis of being human. There is an ever-growing body of human rights' Conventions, Covenants, Treaties and Declarations developed by the United Nations. Domestic (municipal) human rights legislations, administrative actions, policies and awareness represent the local implementation mechanisms of internationally recognized rights that are considered universal and inalienable. However, there are some who argue that the human rights are a misnomer, and that the whole rhetoric of human rights is only a description of a controversial set of ideals.

Human rights can be broadly classified from two different paradigms:

- (1) From the paradigm of various facets of human existence - civil, political, social, economic, cultural etc.; and
- (2) From the paradigm of the basis securing them- constitutional or legal.

It appears from a closer study of modern history that in terms of evolution of human rights, the following parallel foundational trends have gradually evolved over the years and landmarks achieved that too particularly in the European context:

- (1) The rise of Protestantism after Martin Luther (d. 1546 AD) and the belief in popular sovereignty and liberal democracy;
- (2) The liberalist tradition championed by philosophers like Hobbes (1679 AD) Locke (d. 1704 AD) Montesquieu (d.1755), Rousseau (d.1778 AD), Bentham (d. 1832 AD) and John Stuart Mill (d.1873 AD); and
- (3) Political landmarks like Magna Carta (1215AD), American Declaration of Independence (1776 AD), French Declaration of the Rights of the Man and of the Citizen (1789), Bolshevik Revolution in Russia (1917 AD) and Universal Declaration of Human Rights (1948).

2. Motivations of human rights

An overriding motivation for the evolution and growth of human rights is to offer protection from tyrannical and authoritarian tendencies. Inhuman or repressive dispositions of autocratic governments may be limited or remedied with the recognition of supreme moral limits on any policy or action of a government.

The prime utility of concepts and norms of human rights is that they are viewed as being so essential, basic and fundamental to human race that these shall prevail over any other consideration or motivation: 'any conception of 'rights' trumps other claims within a society,

human rights may be of a higher order that supersedes even other rights claims within a society.²

- (4) Other motivations for observance of human rights may arise from a fear of the negative consequences of denying their existence.

3. Foundations of human rights

Many competing foundations have been asserted for universal human rights such as dignity, wellbeing, development and needs as discussed below:

(1) Dignity: Some scholars, especially the Western liberals have argued that human rights exist in order to protect the basic dignity of human life. The United Nations Declaration on Human Rights (1948) embodies this principle by declaring that human rights flow from 'the inherent dignity of the human person. 'We have human rights not to the requisites for health but to those things 'needed' for a life of dignity, for a life worthy of a human being, a life that cannot be enjoyed without these rights'.³

This view is the most pervasively held and has considerable appeal though the promotion of dignity may provide an unstable foundation for the construction of universal moral standards as dignity is a very elastic concept and the substance given to it is very much a moral choice, and a particular conception of dignity becomes paramount.

(2) Well-being: Some argue that human rights are requisites for well-being of humankind. Human rights are not just a product of morality but protect the basic freedoms and wellbeing necessary for human agency.⁴ They distinguish between three types of rights that address different levels of well-being:

- (a) Basic rights safeguard human subsistence or basic well-being;
- (b) Non subtractive rights maintain the capacity for fulfilling purposive agency;
- (c) Additive rights provide the requisites for developing one's capabilities, such as education; and
- (d) Humans are entitled to those rights that are proportionate to their capacity for agency. Thus, individuals who are comatose only have basic rights to subsistence, since they are incapable of any purposive action.⁵

(3) Development: Another basis for human rights is based on evolution and human development. 'The belief that survival is good is virtually universal'. They also get inspiration from theories of evolution to establish that the goal of humans has to be the survival of the species. They wish to propel human rights into a further plane, by basing human survival upon the full development of human potential covering all aspects of intellectual and emotional development.

"The existence of such needs for human development - the need for association with other human beings, for self-expression, for some control over one's destiny, and even the need for

² Ronald Dworkin, 'Is There a Right to Pornography', Oxford Journal Of Legal Studies, 1 (1981) PP 177-212)

³Jack Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca: Cornell University Press, 1989, P.17.

⁴ Amartya Sen. 1989. "Development as Capability Expansion," *Journal of Development Planning* 19: 41-58.

⁵ Allan Gewirth, "Why There Are Human Rights", Social Theory and Practice Vol. 11, No. 2 (Summer 1985), pp. 235-248 Published by: Florida State University Department of Philosophy.

love and for beauty - can be observed and even empirically confirmed within the social sciences and psychology".⁶

A fundamental difficulty with using the fulfilment of human development as a basis for human rights is that it can have a meaning that is relative to each individual, community or society.

(4) Needs: Another alternative basis for human rights would be that human rights provide the needs for human existence. Human rights may be limited to providing all humans with the needs for their physical subsistence that would involve a certain degree of minimal support as human subsistence also consists of being able to function properly. Human rights would guarantee the provision of the food, clothing, healthcare, shelter and work without which anyone would perish.

(5) Advocates of the other approaches to human rights have dismissed needs to subsistence as being too narrow a foundation; however, there are some distinct advantages in basing human rights on the needs of subsistence for human existence. There can be much less disagreement over what is meant by, or needed for, 'survival' than one will find for 'dignity', 'well-being', or 'development'. Therefore, human rights based on subsistence can be much more readily accepted as global standards.⁷

4. Assumptions of human rights

The edifice of modern human rights movement and Declaration of Human Rights rests on some assumptions, such as:-

- (1) There is a universal human nature common to all peoples;
- (2) The human nature is knowable;
- (3) The human nature is known by means of an equally universal organ of knowledge i.e. reason;
- (4) Man is the master of himself and the universe;
- (5) Man is a dignified being;
- (6) Human rights defend the dignity of the individual vis-a-vis society, and the state in particular;
- (7) Man is autonomous and world Human Rights defend the autonomy of the human individual; and
- (8) Society is based on a democratic social order wherein 'free' individuals are organized to achieve otherwise unreachable goods.⁸

Most African and Asian countries did not participate in the formulation of the Universal Declaration of Human Rights because, as subjects of colonialists they were not members of the United Nations. When they participated in the formulation of subsequent instruments, they did so, on the basis of an established framework and philosophical assumptions adopted in their absence. The Third World countries argue that these instruments favoured individual civil and political rights over collective rights such as right to development.⁹

The human rights improvement intends to uphold and preserve the dignity of man. Human dignity appears in the Preamble of the Charter of the United Nations as an ideal that 'we the peoples of the United Nations determined....to reaffirm faith in fundamental human rights, in the dignity and worth of the human person....'.

⁶ (John O'Manique, "*Universal and Inalienable Human Rights: A Search for Foundations*", (1990) 12 Human Rights Quarterly 465-485.

⁷ Johan Galtung, *Human Rights in Another Key*, Cambridge, Mass: Polity Press, 1994.

⁸ Panikar, '*Is the Notion of Human Rights a Western concept?*' 120 Diogenes 75(1982).

⁹ Abdullah Ahmad An-Na'im, '*Human Rights in the Muslim World*' 3 Harv. Hum. Rts. J.13 (1990).

The term is also included in the Preamble and Article 1 of the Universal Declaration of Human Rights: “whereas recognition of the inherent dignity of all members of the human family (Preamble); ‘All human beings are born free and equal in dignity and rights’ (Article 1).

Reference to this is also made in the Helsinki Accord in Principle VII.

Dignity is derived from the Latin word ‘*dignitas*’ which means worth. One lexical meaning of dignity is ‘intrinsic worth’. It means that individuals are not to be treated merely as instruments or objects of the will of others. It purports that a high priority should be accorded in political, social and legal arrangements to individual choices in matters of beliefs, way of life, attitudes, and the conduct of public affairs.

The belief that human rights are derived from the dignity of the person has two corollaries. The first is the ideal that basic rights are not given by authority and, therefore, cannot be taken away; the second is that they are rights of the person, every person.

The lengthening catalogue of rights and freedoms in International human rights now encompasses such matters as pay, work conditions, trade unions, standard of living, rest and leisure, welfare and social security, women’s and children’s rights, and the environment. The temptations to link economic concerns with human rights will certainly rise if economic strains increase.

Some Asian Governments claim that their societies place a higher value on the community than in the West. The communitarian argument is advanced as an instance of the general proposition that rights are culture specific. Sometimes it is based on false assumption that the states are ‘the community’. The most dreadful aspect of this argument is the extensive arming of the state apparatus with the claims of harmonious society. The pervasive use of draconian legislation like administrative detention, dis-establishment of societies, press censorship belies respect for consensus.¹⁰

It is interesting to note that largely Westernized economic and political elite that has long since left traditional cultures far behind, too often makes arguments of cultural relativism. These leaders sing the praises of traditional communities while they wield arbitrary powers antithetical to traditional values, pursue development policies that systematically undermine traditional communities, and replace traditional leaders with corrupt cronies and party hacks. This is a cynical manipulation of tradition occurring everywhere.

5. Nature of human rights

Regardless of different views as to the origin, nature and contents of human rights, there are certain postulates that may assist defining them.

- (1) Human rights are understood to represent individuals and group demands for the sharing of power, wealth, enlightenment and other cherished values.
- (2) Basic values imply claims against persons and institutions that impede realization and standards for judging the legitimacy of laws and traditions. In nutshell, human rights limit societal and state power.
- (3) Human Rights refer to a wide continuum of value claims ranging from judicially justifiable to merely aspirational. They include both the moral (ought) and the legal (is) orders.
- (4) Human Rights are essentially general or universal in their character, equally possessed and claimed by all human beings everywhere. They extend to every person on Earth without any discrimination whatsoever, irrelevant to merit.
- (5) Most human rights are qualified as much as necessary to secure the comparable rights of others and the aggregate common interest.
- (6) Human Rights commonly refer to ‘fundamental’ as distinct from ‘nonessential’ claims.

¹⁰ Yash Ghai, *Human rights and governance*, The Asia Debate, 15 Australia. Y. Int. L.J. (1994).

The Western legal tradition accords a special position to what are called ‘personal’ rights and give individuals or groups within society the power to set limits on the actions of that society. The American legal philosopher, Ronald Dworkin uses an image from the game of bridge to explain this principle: the point is that if any attempt is made to inhibit my freedom, I can play my ‘trump’ card and have the decision revoked in a court of law. This legal system is different from a system where a fundamental law restricts some decisions but where there are no personal rights. The fundamental law might prohibit others from killing someone or imprisoning someone, without giving him the right to life, liberty, and free speech.

The system of personal rights thus has two effects: a) it places limits on the actions of governments and societies; and b) it offers individuals and specific groups the rights to seek redress.

Now certain rights are claimed on behalf of communities. The 17th century Natural law has a strictly atomistic view of society. The modern Romanticism considers man as a cultural being who develops his humanity through a language and the body of knowledge expressed in the form of art, music, literature, or family and political traditions. Because languages and cultures are the property of certain communities, so rights to be claimed have to be attributed to the communities. The right of peoples to self-determination is claimed by communities to determine their political destiny in the interests of full self-expression.¹¹

Some sceptics of the human rights movement argue that human freedoms can also be invaded or denied by non-governmental forms of power e.g. social discrimination on the basis of class, race, colour, gender, or religion. The advocates of the human rights movement reply that it requires to establish arrangements in all social contexts to realize freedoms, in all aspects of human life, committed to dignity, self-realization and equality by a deeper transformation not only of governmental but also of non-state institutions and practices that are left untouched by conventional human rights doctrines.

6. Generations of human rights

Human Rights tradition is a product of time and cumulative human experience. In this context French jurist Karel Vasak (d. 2015) has advanced a simplified concept of ‘three generations’ of human rights. Inspired by the three themes of the French Revolution (1789), the three generations of the human rights are 1) The first generation composed of civil and political rights (*liberté*); 2) The second generation of economic, social, and cultural rights (*égalité*); and 3) The third generation of solidarity or group rights (*fraternité*).¹²

(1) Civil and political rights: The first generation rights derive primarily from the 17th and 18th century reformist theories associated with the English (1688), American (1776), and French revolutions (1789), the political philosophy of liberal individualism and the related economic and social capitalist doctrine of Laissez-faire (Adam Smith-1776). The first generation human rights are generally expressed more in negative terms (freedoms from) than positive ones (rights to) and favour the abstention over the intervention of government in human rights.

The first-generation rights are practically based on the core value of liberty against the abuse of political authority. These rights are enshrined in the constitutions of almost all the

¹¹ Charles Taylor, *Human Rights: The Legal Culture in UNESCO*, in “Philosophical Foundations of Human rights”, (1986), p 49.

¹² *The International Dimensions of Human Rights*. 2 vols. Edited by Karel Vasak. Revised and edited for the English edition by Philip Alston. Westport: Greenwood Press; Paris: UNESCO, 1982. Pp. xxiv, 755

countries in the world and dominate the majority of international Declarations and Covenants adopted since World War II.

The first generation rights are set forth in Articles 2–21 of the Universal Declaration of Human Rights, including:

- (a) Freedom from gender, racial, and equivalent forms of discrimination;
- (b) Right to life, liberty, and security of the person;
- (c) Freedom from slavery or involuntary servitude;
- (d) Freedom from torture and from cruel, inhuman, or degrading treatment or punishment;
- (e) Freedom from arbitrary arrest, detention, or exile;
- (f) Right to a fair and public trial;
- (g) Freedom from interference in privacy and correspondence;
- (h) Freedom of movement and residence; (i) the right to asylum from persecution;
- (i) Freedom of thought, conscience, and religion;
- (j) Freedom of opinion and expression;
- (k) Freedom of peaceful assembly and association; and
- (l) Right to participate in government, directly or through free elections.

(2) Economic, social, and cultural rights: The second generation human rights are primarily economic, social, and cultural rights inspired primarily by the various shades of socialist traditions, revolutionary struggles and welfare movements that have taken place against the abuses of naked capitalism and uncritical conception of individual liberty, which caused, tolerated, and legitimized the worst exploitation of the labour and colonial peoples.

The second generation rights (economic, social, and cultural rights) are antithesis of the first generation rights, (civil and political rights), and are expressed more in positive terms (rights to) than in negative ones (freedoms from) and also require more the intervention than the abstention of the state for assuring the equitable production and distribution of scarce economic resources.

These rights are set forth in Articles 22–27 of the Universal Declaration of Human Rights, such as:

- (a) Right to social security;
- (b) Right to work and to protection against employment;
- (c) Right to rest and leisure, including periodic holidays with pay;
- (d) Right to a standard of living adequate for the health and well-being of self and family;
- (e) Right to education; and
- (f) Right to the protection of one's scientific, literary, and artistic production.

(3) Solidarity or group rights: The third generation human rights are primarily solidarity or group rights that draw upon and re-conceptualize the demands associated with the first two generations of human rights and are a product of both the rise and decline of the state since the mid-20th century. These rights are precisely articulated in Article 28 of the Universal Declaration of Human Rights that reads: 'everyone is entitled to a social and international order in which the rights set forth in this declaration can be fully realized'.

These third generation rights include:

- (a) The right to political, economic, social, and cultural self-determination;
- (b) The right to economic and social development; and
- (c) The right to participate in and benefit from "the common heritage of mankind" (shared Earth and space resources; scientific, technical, and other information and progress; and cultural traditions, sites, and monuments);
- (d) The right to peace;
- (e) The right to a clean and healthy environment; and
- (f) The right to humanitarian disaster relief.

The majority of these third-generation rights are more aspirational than judicially justiciable and that their status as international human rights norms remains somewhat unclear.¹³

7. Universal v relative right

There is debate in the human rights movement in respect of the 'universal' or relative' character relating to the 'absolute' or 'contingent' character of the rights. The advocates of universality claim that international human rights like equal protection or physical security or freedom of speech, religion and association are and must be the same everywhere. On the other hand, the proponents of cultural relativism claim that rights depend on a broad cultural context that includes political, religious ideologies and institutional structures. Hence, concepts of rights differ throughout the World because cultures differ.

The international human rights instruments are on the 'Universalistic' side of the debate: 'everyone has the right to liberty' 'all persons are entitled to equal protection etc. The text of these basic instruments makes no explicit concession to cultural relativity. The relativists call it arrogance or 'cultural imperialism' of the West. They further argue that it will destroy diversity of cultures leading to homogenization in the world.

These debates were dominantly between the Communist world and the Western democracies. The West accused the Communist world of negating many civil and political rights (first generation rights) whereas the Socialist countries accused the West for ignoring many economic and social rights (second generation rights). The West argued that egalitarian claims are not possible without a severe decline in liberty and quality. The Socialists argued that the first generation's rights are insufficiently attentive to material human needs and are used to legitimize unjust social orders - hence constitute a 'bourgeois illusion'.

The harsher critics say that ethical relativism has commitment to the status quo that helps oppressors throughout the world. Instead of leaving cultures as they are, as museum pieces, we should help to bring about change.¹⁴

The American Anthropological Association submitted in 1947 to Commission on Human Rights that was considering Universal Declaration of Human Rights that the proposed Declaration be applicable to all human beings and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America.

The Declaration must be based on recognition of the fact that the personality of the individual can develop only in terms of the culture of his society which shapes his behaviour, very thoughts, hopes, aspirations and moral values. The colonialists' Doctrines of the 'white man's burden' or 'primitive mentality' are marked by demoralization of human personality and disintegration of human rights among the peoples over whom hegemony has been established.¹⁵

The Association then proposed three fundamental guidelines essential in drawing up a Bill of Human Rights in terms of existing knowledge:

- (1) The individual realizes his personality through his culture; hence, respect for individual differences entails a respect for cultural differences.
- (2) Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered.
- (3) Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to

¹³ <https://www.britannica.com/topic/human-rights>

¹⁴ Elvin Hatch, 'Culture and Morality', *The Relativity of Values in Anthropology*, 1983.

¹⁵ Jack Donnelly, 'Universal Human Rights in Theory and Practice' (1989), p 118.

that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.¹⁶

The human rights activists consider the 1948 Universal Declaration of Human Rights (UDHR) a sacred and universal document beyond any question. However, the claimed universality of the UDHR has been severally criticized by some, not least by members of the American Anthropological Association (AAA) on the ground that by claiming human rights are universal:

- (a) We ignore and undermine the cultural differences that exist between societies in different parts of the world;
- (b) Our paradigm and our role in the world is shaped by the social milieu in which we live and our moral standards, values depend on our cultural upbringing;
- (c) The UNDHR is a Western-biased document that miserably fails to take care of the cultural norms and values, which exist in the rest of the world; rather, it is an attempt to impose Western values on everybody else. 'The West now masks its own will to power in the impartial, universalizing language of human rights and seeks to impose its own narrow agenda on a plethora of world cultures that do not actually share the West's conception of individuality, selfhood, agency, or freedom. – Michael Ignatieff¹⁷
- (d) There is more emphasis on individual rights heavily emphasized in the non-Western world as opposed to communal rights, which tend to be valued more by the Eastern world.

By focusing on the individual rights, the UNHDR did an honest attempt to transcend all cultural biases in such a way that it becomes relevant to all, no matter what their roots are; however, some societies still believe that the UNDHR represents a neo-imperialist attempt by the white West to fashion and control the lives of those in the developing world e.g. the Kingdom of Saudi Arabia abstained from the vote on the UNDHR on the basis that Articles 16 (right for men and women to marry who they choose) and 18 (right to freedom of religion) were contrary to teachings of Islam. On the other hand, 90 percent countries of the world have ratified the UDHR and it has also been argued by some Muslim scholars that a progressive interpretation of Sharia law can be compatible with universal human rights.

Some writers have argued that it is essential to recognize that universality of human rights does not presuppose uniformity on human rights. The notion of universality of human rights is not to suggest that our views of human rights transcend all possible philosophical, cultural, or religious differences or represent a magical aggregation of the world's ethical and philosophical systems; rather, it is enough that they do not fundamentally contradict the ideals and aspirations of any society, and that they reflect our common universal humanity, from which no human being must be excluded. Similarly, the humanity has a challenge to work towards the 'indigenization' of human rights, and their assertion within each country's traditions and history. If different approaches are welcomed within the established framework, this flexibility can guarantee universality, enrich the intellectual and philosophical debate, and so complement, rather than undermine, the concept of worldwide human rights.¹⁸

¹⁶ Statement of Human Rights, 49 Amer. Anthropologist No. 4, 539 (1947).

¹⁷ <https://www.foreignaffairs.com/articles/2001-11-01/attack-human-rights>.

¹⁸ Shashi Tharoor, "Are Human Rights Universal?" *World Policy Journal*, Vol. XVI, No. 4 (Winter 1999/2000)

Chapter Two

EVOLUTION OF HUMAN RIGHTS

Concepts about right to life and property and righteousness have established ancient precedents in many religions, philosophies and literary traditions of the world; however, the idea of modern human rights germinated during the eras of renaissance, enlightenment, humanism, and liberalism and these ideas of human rights became the very basis of American and French Revolutions, culminating in the Universal Declaration of Human Rights.

1. Urukagina Code (24th century)

Urukagina was the king of the small city state Lagash in Mesopotamia (modern day Iraq). He introduced reforms, which are sometimes termed as the first example of a Law Code in known history but it has not survived as a document. His reforms aimed at seeking to achieve a higher level of freedom and equality, limiting the powers of the priests and large property owners and taking measures against usury, burdensome controls, hunger, theft, murder, and seizure of people's property and persons. He introduces, including, the following laws:

- 1) The widows and orphans were exempted from taxes;
- 2) The city government shall pay funeral expenses, including the ritual food and drink;
- 3) If the poor does not wish to sell, the powerful man cannot force him to do so;
- 4) The widows and the orphans shall be no longer at the mercy of the powerful men;
- 5) The former custom of polyandry was abolished in the country, and woman taking multiple husbands were stoned with rocks upon;
- 6) Traditional control of the head boatman over the boats, of the livestock official over asses and sheep, and of the fisheries inspector over fishing, was abolished;
- 7) The regime of grain taxes was liberalized;
- 8) The administrators no longer could plunder the orchards of the poor; and

- 9) Cancellations of obligations for those indentured families, citizens living as debtors because of grain taxes, barley payments, theft or murder.¹⁹

2. The Code of Ur-Nammu (2050 BC)

The Code of Ur-Nammu is the oldest known Law Code surviving till today. It is from Mesopotamia and is written on tablets. Among the surviving laws inscribed in the Code are:

- 1) If a man commits a murder, that man shall be killed;
- 2) If a man commits a robbery, he shall be killed;
- 3) If a man commits a kidnapping, he is to be imprisoned and pay 15 coins of silver;
- 4) If a man violates the right of another and deflowers the virgin wife of a young man, they shall kill that male;
- 5) If a man divorces his first-time wife, he shall pay her some silver;
- 6) If a man accuses the wife of a man of adultery, and the river ordeal proved her innocent, then the man who had accused her shall pay some silver;
- 7) If a prospective son-in-law enters the house of his prospective father-in-law, but his father-in-law later gives his daughter to another man, the father-in-law shall return to the rejected son-in-law twofold the amount of bridal presents he had brought;
- 8) If a man knocks out the eye of another man, he shall pay some silver.²⁰

3. The Code of Hammurabi (1754 BC)

The Code of Hammurabi a well-preserved Babylonian code of law enacted by the sixth Babylonian king, Hammurabi. It consists of 282 laws, with scaled punishments. The Code deals with matters of contract, wages, liability of a builder, property, household and family relationships such as inheritance, divorce, paternity, and reproductive behaviour. The Code was arranged in orderly groups for easy reference.

The provisions of the Code entail:

- 1) There shall be presumption of innocence;

¹⁹ http://history-world.org/reforms_of_urukagina.htm;

<https://www.goodreads.com/book/show/20435556-the-reforms-of-urukagina>

²⁰ <https://www.ancient-origins.net/artifacts-ancient-writings/code-ur-nammu-when-ancient-sumerians-laid-down-law-everyone-obeyed-009333>; <https://oll.libertyfund.org/pages/code-of-ur-nammu-ca-2050-b-c>

- 2) Both the accused and accuser shall have the opportunity to provide evidence;
- 3) If anyone points the finger at a sister of a god or the wife of any one, and cannot prove it, this man shall be taken before the judges and his brow shall be marked by cutting the skin or hair;
- 4) If a herdsman, to whose care cattle or sheep have been entrusted, be guilty of fraud and make false returns of the natural increase, or sell them for money, then shall he be convicted and pay the owner ten times the loss;
- 5) If anyone take a male or female slave of the court, or a male or female slave of a freed man, outside the city gates, he shall be put to death;
- 6) If anyone take over a field to till it, and obtain no harvest therefrom, it must be proved that he did no work on the field, and he must deliver grain, just as his neighbour raised, to the owner of the field;
- 7) If anyone is committing a robbery and is caught, then he shall be put to death;
- 8) If a merchant gives an agent corn, wool, oil, or any other goods to transport, the agent shall give a receipt for the amount, and compensate the merchant therefor. Then he shall obtain a receipt from the merchant for the money that he gives the merchant;
- 9) If a woman is guiltless, and there is no fault on her part, but he leaves and neglects her, then no guilt attaches to this woman, and she shall take her dowry and go back to her father's house;
- 10) If a man destroys the eye of another man, they shall destroy his eye. If one breaks a man's bone, they shall break his bone. If one destroys the eye of a freeman or break the bone of a freeman, he shall pay fine in gold. If one destroys the eye of a man's slave or break a bone of a man's slave he shall pay one-half his price; and
- 11) If the wife of a man has been caught lying with another man, they shall bind them and throw them into the waters.²¹

4. Twelve Tables (455 B C)

The earliest attempt by the Romans to create a code of law was the Laws of the Twelve Tables. A commission of ten men was appointed to

²¹ <https://www.history.com/topics/ancient-history/hammurabi>;
<https://www.britannica.com/topic/Code-of-Hammurabi>

draw up a binding code of law, which consuls would have to enforce. Brief provisions of the Tables are as under:

- 1) If anyone summons a man before the magistrate, he must go. If the man summoned does not go, let the one summoning him call the bystanders to witness and then take him by force. If he shirks or runs away, let the summoner lay hands on him. When the litigants settle their case by compromise, let the magistrate announce it.
- 2) One who has confessed a debt, or against whom judgment has been pronounced, shall have thirty days to pay it in. After that forcible seizure of his person is allowed. The creditor shall bring him before the magistrate.
- 3) A child born after ten months since the father's death will not be admitted into a legal inheritance.
- 4) Females should remain in guardianship even when they have attained their majority.
- 5) When one makes a bond and a conveyance of property, as he has made formal declaration so let it be binding.
- 6) Let them keep the road in order. If they have not paved it, a man may drive his team where he likes.
- 7) Should a tree on a neighbour's farm be bent crooked by the wind and lean over your farm, you may take legal action for removal of that tree. A man might gather up fruit that was falling down onto another man's farm.
- 8) If one has maimed a limb and does not compromise with the injured person, let there be retaliation. If one has broken a bone of a freeman with his hand or with a cudgel, let him pay a penalty of three hundred coins. If he has broken the bone of a slave, let him have one hundred and fifty coins. If one is guilty of insult, the penalty shall be twenty-five coins.
- 9) If one is slain while committing theft by night, he is rightly slain.
- 10) A person who had been found guilty of giving false witness shall be hurled down from the rock.
- 11) The penalty shall be capital for a judge or arbiter legally appointed who has been found guilty of receiving a bribe for giving a decision.

- 12) He who shall have roused up a public enemy or handed over a citizen to a public enemy must suffer capital punishment.²²

5. Cyrus Cylinder (530 B C)

More than 2 million years before the French Revolution (1789) introduced the Declaration of the Rights of Man and of the Citizens, an ancient king Cyrus issued a charter that is considered to be the oldest known declarations of human rights and is now called the Cyrus Cylinder. The inscriptions on the cylinder tell about promotion of religious, racial, and linguistic freedom and permission to those deported by the Babylonians (the Jews) to return to their homelands. It read:

‘I announce that I will respect the traditions, customs and religions of the nations of my empire and never let any of my governors and subordinates look down on or insult them while I am alive. From now on, I never let anyone oppress any others, and if it occurs, I will take his or her right back and penalize the oppressor.’

‘I will never let anyone take possession of movable and landed properties of the others by force or without compensation. While I am alive, I prevent unpaid, forced labour. Today, I announce that everyone is free to choose a religion. People are free to live in all regions and take up a job provided that they never violate other’s rights’.²³

6. Edicts of Ashoka (268-232 BC)

Ashoka the Great, ruled over a territory that stretched from Afghanistan to the Bay of Bengal. After bloody war, he focused his efforts mainly on welfare, non-violence, fair treatment and law as well as spreading Buddhism. All his rules and policies were inscribed into several pillars throughout his whole empire and these are now known as Ashoka’s edicts. Some of his edicts are:

- 1) It is my desire that there should be uniformity in law and uniformity in sentencing;
- 2) There shall be fair treatment of all mankind, including proper behaviour towards servants and employees;²⁴

²² file:///Users/macair/Desktop/The%20Laws%20of%20the%20Twelve%20Tables,%20c.450%20B.C..html

²³ <https://www.ancient-origins.net/artifacts-ancient-writings/cyrus-cylinder-and-ancient-proclamation-human-rights-002311>

²⁴ <https://worldwidewalkers.wordpress.com/2013/10/03/ashokas-edicts/>

- 3) Dharma is good. And what is Dharma? It is having few faults and many good deeds, mercy, charity, truthfulness and purity;
- 4) Thus, the glory of Dharma will increase throughout the world, and it will be endorsed in the form of mercy, charity, truthfulness, purity, gentleness, and virtue;
- 5) This is my instruction from now on. Men who are imprisoned or sentenced to death are to be given three days respite. Thus, their relations may plead for their lives, or, if there is no one to plead for them, they may make donations or undertake a fast for a better rebirth in the next life. For it is my wish that they should gain the next world;
- 6) The Beloved of the Gods, the king Piyadassi, wishes that all sect may dwell in all places, for all seek self-control and purity of mind;
- 7) For whosoever praises his own sect or blames other sects, — all (this) out of pure devotion to his own sect, (i.e.) with the view of glorifying his own sect, if he is acting thus, he rather injures his own sect very severely. But concord is meritorious, (i.e.) that they should both hear and obey each other's morals;
- 8) On the roads banyan trees were caused to be planted by me, (in order that) they might afford shade to cattle and men, (and) mango groves were caused to be planted. And (at intervals) of eight kos (miles) wells were caused to be dug by me, and flights of steps (for descending into the water) were caused to be built. Numerous drinking-places were caused to be established by me, here and there, for the enjoyment of cattle and men;
- 9) The king renounces victory by wars of conquest. The Beloved of the Gods considers victory by dharma to be the foremost victory.
- 10) Hospitals for people and animals will be built; gardens for growing medicinal plants will be established;
- 11) People should obey their parents and religious elders; people should not mistreat their servants and slaves; people should be generous to religious persons, relatives and friends;
- 12) My officials will attend to the welfare of the aged, the poor, and prisoners; my officials will make sure that the government of the empire is run efficiently for the welfare and happiness of the people;
- 13) Judges will be independent and will exercise uniformity in procedure and punishment; wrongdoers should be forgiven as much

- as possible; capital punishment should be used with restraint and the condemned should have three days to appeal their sentence;
- 14) It is good not to kill living beings.²⁵

6. Natural Law and Human Rights

At the philosophical level, the Greek Stoic philosophers primarily contributed towards the development of the concept of natural rights of man. They first developed the theory of natural law and then by virtue of it, they explained the nature of human rights, that is, the rights that every human being possesses by virtue of being human. The concept of 'natural law' emerged in Greek philosophy with the notions of justice and rational endeavour to overcome the irrationality of early myths that believed that 'justice' lay in the destiny, which is beyond the rational process of man.

However, according to Socrates (d. 399), who precedes Stoics, man possesses 'insight' and this insight reveals to him the goodness and badness of things and makes him know the absolute, eternal and moral rules. This human 'insight' is the basis to Judge the law. Similarly, it may be clarified that the citizens of the Greek City states enjoyed some basic rights even before the formulation of natural law theory by the Stoics: they were in particular:

- a. The right to freedom of speech;
- b. The right to equality before law; and
- c. The right to equal respect for all.

Plato (d. 348 BC) and Aristotle (d. 322 BC) adorned natural law philosophy. According to Plato, 'Natural law is the unchanging 'idea of law', which being forever the same. It seems that the concept of natural law is in fact the mankind's perennial search for absolute justice and its experimentation. They consider natural law higher than the positive law, to which appeal can be made. However, the Stoics gave natural law a well-defined nature and content. They defined man in terms of the reason, which is its true self, which pervades throughout the Universe and such reason is the source of law and justice. They considered the state as the place where goodness could be realized.

²⁵ <http://www.crf-usa.org/bill-of-rights-in-action/bria-14-4-b-the-edicts-of-asoka>

Heraclitus (500 BC) said that 'wisdom is to speak the truth and to act according to the nature...If we speak with intelligence, we must base our strength on that which is common to all, as the city on the law. Later, such ever-relevant pronouncement of Heraclitus became the basis of Stoic philosophy that was founded by Zeno (d. 260 BC), when the idea of the superiority of city State was not able to meet the challenges of new age empire. It was an 'intellectual' support of man of political, moral and religious convictions. It gave a positive moral meaning to the idea of a world-wide State and a Universal law'.

Stoicism believes that Nature is the manifestation of a single unified spirit and the life should be led according to nature; the law of nature is the common, universal, divine and good rule of reason which governs 'creatures combined in a natural association' and is unchanging; man and nature are not opposites; both partake of reason and harmony, which are more important than accidental differences; man is rational and that God is rational; the same divine fire which pervades throughout the world, also resides in human souls; hence, the true self is the reason and reason is a universal force giving birth to law and justice.

According to the Stoic teaching of *oikeiosis* (familiarization / extension of human attachment) the individual should, by way of rational argument, extend his concern for himself in concentric circles until all humankind is eventually included. Antiochus of Ascalon in Syria (first century BC) explains the concept concisely: 'In the whole of morality ... there is nothing more brilliant, nor of greater extent than the association of people with other people, a kind of community and sharing of advantages and a real affection for the human race. It is born with us from conception, since children are loved by their parents, and the whole household is held together by marriage and offspring, and gradually spreads abroad, first through kin relationships, then marriage connections, then friendships, then relations of proximity, then to fellow-citizens and those who are allies and friends politically, and finally embraces the entire race. This attitude of the mind, which allots to each their own, and maintains this community of human association is called justice'.²⁶

²⁶ Cicero, De Finibus V 65, in Annas 1993:316-317

Early Roman jurists applied the stoic philosophy. Cicero (d. 43 BC), argued that ‘true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibition... And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one external and unchangeable law will be valid for all nations, and all times and there will be one master and ruler, that is God, over us all, for he is the author of this law, its promulgator and its enforcing judge ... the mind and reason of the intelligent was the standard by which justice and injustice were to be measured in the age of the eternal law all men are equal, not in learning, but in the possession of reason, in their psychological make up and in their general attitude toward, what they believe to be honorable or basic; justice is equality before law and it is meant for collective well-being’.²⁷

8. Bible and Human Rights

The biblical paradigm of human beings is special because human beings were created to live in relationship with God; thus, human beings find their full humanity only as they live in relationship with their God and this relationship between God and human beings is broken because of sin. God brought tribes of Israel out of Egypt and gave them a special mission in the world and a set of laws concerning the rights of individuals in Israel, both the natives and the foreigners.

The biblical concept of human rights is based on the nature of human beings as created in the image and likeness of God.²⁸ The concept that human beings are created in the image of God has several implications for ethical conduct:

- 1) All human beings are called to reflect the character of the one in whose likeness they have been made; it has implications for the conduct and accountability of all people;

²⁷ For details see:

http://shodhganga.inflibnet.ac.in/bitstream/10603/187007/8/08_chapter%203.pdf

http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2014000100002

Read more at <https://www.gresham.ac.uk/lectures-and-events/when-was-the-idea-of-human-rights-invented-and-do-we-need-it#HTotA2PDgupfS8Mv.99>

²⁸ Genesis 1:26-27: ‘Then God said, ‘Let us make humankind in our image, according to our likeness;’ so God created humankind in his image, in the image of God he created them; male and female he created them’.

- 2) It emphasizes the sanctity of human life;
- 3) It stresses the equality of human beings and the importance of proper conduct toward others, who are also made in God's image.

The true basis for human rights in the Bible is the nature and the character of God; those who despise God also despise their neighbor: 'Those who mock the poor insult their Maker'.²⁹

The human beings are required to display the qualities that God has. Jacob wrote: 'If man's nature can be defined by the theme of the image of God, his function can be qualified as an imitation of God'.³⁰ 'If people want to boast, they should boast about this: 'They should boast that they understand and know me. They should boast that they know and understand that I, the Lord, act out of faithfulness, fairness, and justice in the earth and that I desire people to do these things, says the Lord'.³¹ For example:

- 1) Several laws in the Old Testament deal with the humane treatment of slaves based on the fact that Israel had been a slave in Egypt: 'Remember that you were a slave in the land of Egypt, and the Lord your God redeemed you; for this reason, I lay this command upon you today'.³²
- 2) The people were to care for aliens and foreigners who lived in Israel because they had been foreigners in Egypt: 'You must not oppress a foreigner, since you know the life of a foreigner, for you were foreigners in the land of Egypt'.³³
- 3) Israel should take care of the poor because at one time, they were also poor: 'If any of your kin fall into difficulty and become dependent on you, you shall support them; they shall live with you as though resident aliens. Do not take interest in advance or otherwise make a profit from them, but fear your God; let them live with you. You shall not lend them your money at interest taken in advance, or provide them food at a profit. I am the Lord your God, who brought you out of the land of Egypt'.³⁴
- 4) It is because of the image and likeness of God in humans that God demands that humans respect the life of others: 'You shall not

²⁹ Proverbs 17:5

³⁰ *Theology* 1958:173

³¹ Jeremiah 9:24

³² Deuteronomy 15:15

³³ Exodus 23:9

³⁴ Leviticus 25:35-38

- murder’;³⁵ ‘Whoever sheds human blood, by other humans must his blood be shed; for in God’s image God has made humankind’.³⁶
- 5) They should not ‘deprive all the oppressed of their rights’;³⁷ Open your mouth for the mute, for the rights of all who are destitute. Open your mouth, judge righteously, defend the rights of the poor and needy.³⁸
 - 6) The importance of justice for the weak and taking care of orphans and destitute is emphasized. ‘Give justice to the weak and the fatherless; maintain the right of the afflicted and the destitute’.³⁹
 - 7) To establish a socially just society is accentuated by emphasis on command to ‘Learn to do good; seek justice, correct oppression; bring justice to the fatherless, plead the widow’s cause’.⁴⁰
 - 8) Any form of discrimination, be it race, sex, colour or social status, is negated and equality of humans are preached: ‘There is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus’.⁴¹ ‘Here there is not Greek and Jew, circumcised and uncircumcised, barbarian, Scythian, slave, free; but Christ is all, and in all’.⁴²
 - 9) People are taught that all are equal before the Lord. ‘The rich and the poor meet together; the Lord is the maker of them all’.⁴³ ‘The Spirit of the Lord is upon me, because he has anointed me to proclaim good news to the poor.
 - 10) Freedom and liberty were the ‘new’ human values to be admired. ‘He has sent me to proclaim liberty to the captives and recovering of sight to the blind, to set at liberty those who are oppressed, to proclaim the year of the Lord’s favor’.⁴⁴
 - 11) The rights of orphans and widows are advocated in terms that ‘Religion that is pure and undefiled before God, the Father, is this: to visit orphans and widows in their affliction, and to keep oneself unstained from the world’.⁴⁵

³⁵ Exodus 20:13

³⁶ Genesis 9:6

³⁷ Proverbs 31:5, NIV

³⁸ Proverbs 31:8-9

³⁹ Psalm 82:3

⁴⁰ Isaiah 1:17

⁴¹ Galatians 3:28

⁴² Colossians 3:11

⁴³ Proverbs 22:2

⁴⁴ Luke 4:18-19

⁴⁵ James 1:27

- 12) Usurping the rights or properties of neighbours are forbidden ‘You shall not covet your neighbor’s house; you shall not covet your neighbor’s wife, or his male servant, or his female servant, or his ox, or his donkey, or anything that is your neighbor’s’.⁴⁶
- 13) A fair and impartial judgment is required from judges, in situations of conflict between the fellow men. ‘And I charged your judges at that time, ‘Hear the cases between your brothers, and judge righteously between a man and his brother or the alien who is with him. You shall not be partial in judgment. You shall hear the small and the great alike. You shall not be intimidated by anyone, for the judgment is God’s.’⁴⁷ Keep far from a false charge, and do not kill the innocent and righteous, for I will not acquit the wicked.’⁴⁸
- 14) The truthfulness of a witness and sufficiency of evidence to prove an incident is also required. ‘A single witness shall not suffice against a person for any crime or for any wrong in connection with any offense that he has committed. Only on the evidence of two witnesses or of three witnesses shall a charge be established’.⁴⁹ ‘You shall not bear false witness against your neighbor’.⁵⁰
- 15) Slavery is prohibited in its absolute form and freedom is wished for. ‘For freedom Christ has set us free; stand firm therefore, and do not submit again to a yoke of slavery.’⁵¹ ‘Whoever steals a man and sells him, and anyone found in possession of him, shall be put to death.’⁵² ‘If your brother becomes poor beside you and sells himself to you, you shall not make him serve as a slave’.⁵³
- 16) For happy matrimonial life, husbands, wives and children are preached to love one another and avoid being cruel. Husbands, love your wives, and do not be harsh with them.⁵⁴ Wives, submit to your husbands, as is fitting in the Lord. Husbands, love your wives, and do not be harsh with them.⁵⁵ Children, obey your parents in everything, for this pleases the Lord.⁵⁶

⁴⁶ Exodus 20:17

⁴⁷ Deuteronomy 1:16-17

⁴⁸ Exodus 23:7

⁴⁹ Deuteronomy 19:15

⁵⁰ Exodus 20:16

⁵¹ Galatians 5:1

⁵² Exodus 21:16

⁵³ Leviticus 25:39

⁵⁴ Colossians 3:19

⁵⁵ Colossians 3:18-19

⁵⁶ Colossians 3:20

9. Human Rights in Islam

Islam claims that human rights have been granted by God and are inherent in human being; thus, neither they have been granted by any king or any legislature nor they can be withdrawn by them. Every Muslim, may be a citizen or ruler, have to accept and enforce them and if they fail to enforce them, ‘they are the wrong-doers’⁵⁷ and ‘they are evil-livers’.⁵⁸ Islam advocates, among others, the following human rights:

- 1) Right to life: The Holy Quran lays down: ‘Whosoever kills a human being without (any reason like) man slaughter, or corruption on earth, it is as though he had killed all mankind’ and ‘And whoever saves a life it is as though he had saved the lives of all mankind’.⁵⁹ However, a life can be taken in retaliation for murder etc., by a due process of law: Do not kill a soul which Allah has made sacred except through the due process of law’.⁶⁰ The Prophet Muhammad (PBUH) said on the occasion of the Farewell Hajj: ‘Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection’. The Prophet has also said about the non-Muslim citizens of the Muslim State: ‘One who kills a man under covenant (i.e. a dhimmi) will not even smell the fragrance of Paradise’.⁶¹
- 2) Right to dignity of women: Islam commands that chastity of a woman shall be respected and protected under all circumstances, and a Muslim cannot outrage her under any circumstances: The Quran says: ‘Do not approach (the bounds of) adultery’.⁶²
- 3) Economic rights: The Quran enjoins upon its followers: ‘And in their wealth there is acknowledged right for the needy and destitute’.⁶³
- 4) Right to freedom: Islam has absolutely forbidden the primitive practice of enslaving a free man or to sell him into slavery. The Prophet (PBUH) says: ‘There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgement. Of these three, one is he who enslaves a free man, then sells him and eats this money’.⁶⁴ Thus, the problem of the slavery in Arabia was solved in a short period of forty years and after this the only form of slavery which was left in Islamic society was the prisoners of war, who were captured on the battlefield

⁵⁷ The Quran: 5:45

⁵⁸ The Quran (5:47)

⁵⁹ The Quran (5:32)

⁶⁰ The Quran (6:151)

⁶¹ Al-Bukhari and Abu Dawud

⁶² The Quran (17:32)

⁶³ The Quran (51:19)

⁶⁴ Al-Bukhari and Ibn Majjah

and were handled as per established norms of prevailing international law.

- 5) Right to justice: The Quran says: (a) 'Do not let your hatred of a people incite you to aggression';⁶⁵ (b) 'And does not let ill-will towards any folk incite you so that you swerve from dealing justly. Be just; that is nearest to heedfulness';⁶⁶ and (c) 'You who believe stand steadfast before God as witness for (truth and) fair play'.⁶⁷
- 6) Equality: Islam recognizes absolute equality among human race irrespective of any distinction of colour, race or nationality. The Quran says: 'O mankind, we have created you from a male and female'; 'And we set you up as nations and tribes so that you may be able to recognize each other'; 'Indeed, the noblest among you before God are the most heedful of you'.⁶⁸ The Prophet of Islam says: 'No Arab has any superiority over a non-Arab, nor does a non-Arab have any superiority over an Arab. Nor does a white man have any superiority over a black man, or the black man any superiority over the white man. You are all the children of Adam, and Adam was created from clay'.⁶⁹
- 7) Right to cooperate: Islam has prescribed a general principle of universal application by saying: 'Co-operate with one another for virtue and heedfulness and do not co-operate with one another for the purpose of vice and aggression'.⁷⁰
- 8) Right to dignity: The Holy Quran clearly lays down: (a) 'You who believe, do not let one (set of) people make fun of another set'; (b) Do not defame one another; (c) Do not insult by using nicknames; and (d) And do not backbite or speak ill of one another'.⁷¹
- 9) Right to privacy: Islam clearly recognizes the right of every citizen to privacy and non-interference. The Quran says: (a) 'Do not spy on one another';⁷² (b) 'Do not enter any houses except your own homes unless you are sure of their occupants' consent';⁷³ and (c) The Prophet says: 'When the ruler begins to search for the causes of dissatisfaction amongst his people, he spoils them'.⁷⁴

⁶⁵ The Quran (5:2)

⁶⁶ The Quran (5:8)

⁶⁷ The Quran (4:135)

⁶⁸ The Quran (49:13)

⁶⁹ Al-Bayhaqi and al-Bazzaz

⁷⁰ The Quran (5:2)

⁷¹ The Quran (49:11-12)

⁷² The Quran (49:12)

⁷³ The Quran (24:27)

⁷⁴ Abu Dawud

- 10) Right to justice: The Quran is very clear on this point: (a) ‘Whenever you judge between people, you should judge with (a sense of) justice’;⁷⁵ (b) ‘No bearer of burdens shall be made to bear the burden of another’⁷⁶; (c) The Prophet of Islam says: ‘I have been ordered to dispense justice between you’; and (d) Umar bin Khattab, the second Caliph according to the Sunni school of thought, said: ‘In Islam no one can be imprisoned except in pursuance of justice’.
- 11) Freedom of conscience: Islam guarantees freedom of conscience and conviction. The Quran decrees: (a) ‘There should be no coercion in the matter of faith’;⁷⁷ (b) ‘Do not abuse those they appeal to instead of God’;⁷⁸ and (c) “Do not argue with the people of the Book unless it is in the politest.”
- 12) Right to property: Islam has categorically declared: (a) ‘Do not devour one another's wealth by false and illegal means’.⁷⁹ (b) “And in their wealth there is acknowledged right for the needy and the destitute”;⁸⁰ (c) The Prophet says: “It will be taken from their rich and given to those in the community in need”⁸¹; and (d) The Prophet has said: “The Head of state is the guardian of him, who has nobody to support him”.⁸²
- 13) Equality Before Law: The Holy Quran says: (a) “The believers are brothers (to each other)”;⁸³ (b) “If they (disbelievers) repent and keep up prayer and pay the poor-due, they are your brothers in faith”;⁸⁴ (c) The Prophet has said that: “The life and blood of Muslims are equally precious”;⁸⁵ (d) “The protection given by all Muslims is equal. Even an ordinary man of them can grant protection to any man”;⁸⁶ (e) “then they have the same rights and obligations as other Muslims have”⁸⁷; and (f) As far as the non- Muslim citizens are concerned, the Caliph Ali says: “They have accepted our protection only because their lives may be like our lives and their properties like our properties”⁸⁸

⁷⁵ The Quran (4:58)

⁷⁶ The Quran (6:164)

⁷⁷ The Quran (2:256)

⁷⁸ The Quran (6:108)

⁷⁹ The Quran (2:188)

⁸⁰ The Quran (51:19)

⁸¹ Al-Bukhari and Muslim

⁸² Abu Dawud, al-Tirmidhi

⁸³ The Quran (49:10)

⁸⁴ The Quran (9:11)

⁸⁵ Abu Dawud; Ibn Majjah

⁸⁶ Al-Bukhari; Muslim; Abu Dawud

⁸⁷ Al-Bukhari; al-Nisa’i

⁸⁸ Abu Dawud

14) Right to political rights: The Holy Quran says: (a) “God has promised to appoint those of you who believe and do good deeds as (His) representatives on earth”⁸⁹. (c) The Holy Quran says: “And their business is (conducted) through consultation among themselves”.⁹⁰

15) Humanitarian rights: Islam has described in details the humanitarian law about conduct of warfare: (a) The Holy Quran says: “If you apprehend breach of treaty from a people, then openly throw the treaty at their faces”.⁹¹

The Prophet says: (a) “Do not kill any old person, any child or any woman”;⁹² (b) “Do not kill the monks in monasteries” or “Do not kill the people who are sitting in places of worship”;⁹³ (c) “The Prophet has prohibited the believers from loot and plunder”;⁹⁴ and (d) “The Prophet has prohibited us from mutilating the corpses of the enemies”.⁹⁵

10. Magna Carta (1215)

Magna Carta, also called English Great Charter, was granted by King John on June 15, 1215, under threat of civil war and reissued with alterations in 1216, 1217, and 1225. It declared that the sovereign will be subject to the rule of law, documented the liberties held by free men, and provided the foundation for individual rights in Common Law.

With his conquest of England (1066), every sovereign on coronation granted a new charter promising to restore and confirm the liberties and customs that belonged ‘to God and holy church and all his earls, barons and all his men’. The Common Law developed gradually but there were no fixed financial liabilities of the baronage to the crown and there was no prescription of the rights of justice barons held over their own subjects. Furthermore, the barons and earls became more restive with increasing taxes and shifting of their powers due to the rise of new professional classes.

In this background, the barons and earls camped near at Runnymede, Windsor, and on June 15, 1215, the Articles of the Barons was agreed upon, and out of which emerged the final version of the

⁸⁹ The Quran (24:55)

⁹⁰ The Quran (42:38)

⁹¹ The Quran (8:58)

⁹² Abu Dawud

⁹³ Musnad of Ibn Hanbal

⁹⁴ Al-Bukhari; Abu Dawud

⁹⁵ Al-Bukhari; Abu Dawud

Magna Carta accepted by the king and the barons on June 19. It was reissued with amendments in 1216, 1217 and finally it was issued in 1225, which become a sober statement of the common law containing important clauses to initiate reforms in judicial and local administration and it became a symbol of civil liberties and limited government.

The original charter (1215) had 63 clauses but the final Charter (1225) has 37 clauses and their summary as to modern human rights, leaving aside rights given to earls and barons, is as under:

- 1) We have granted to God that the English church shall be free and shall have all its rights undiminished and its liberties unimpaired.
- 2) We have also granted to all free men of our kingdom, all the liberties written below to be had and held by them and their heirs of us forever.
- 3) A widow shall have her marriage portion and inheritance forthwith and without any difficulty after the death of her husband. There shall be assigned to her for her dower a third of all her husband's land. No widow shall be forced to marry so long as she wishes to live without a husband.
- 4) We or our bailiffs will not seize for any debt any land or rent, so long as the available chattels of the debtor are sufficient to repay the debt and nor will those who have gone surety for the debtor be distrained so long as the principal debtor is himself able to pay the debt.
- 5) The city of London shall have all its ancient liberties and free customs. Furthermore, we will grant that all other cities, boroughs, towns, all their liberties and free customs.
- 6) Common Pleas Courts (civil courts) shall be held in some fixed place.
- 7) We will send justices through each county once a year, who with knights of the counties shall hold the said assizes (courts) in the counties.
- 8) A free man shall not be amerced for a trivial offence except in accordance with the degree of the offence and for a grave offence in accordance with its gravity; and none of the aforesaid amercements shall be imposed except by the oath of good and law-worthy men of the neighborhood.
- 9) No individual shall be compelled to make bridges at river banks, except one who from of old is legally bound to do so.
- 10) No river bank shall henceforth be made a preserve, except those which were preserves in the time of King Henry.
- 11) No sheriff, or bailiff, or other person shall take anyone's horses or carts for transport work unless he pays for them at the

old-established rates, neither we nor our bailiffs nor others will take, for castles or other works of ours, timber which is not ours, except with the agreement of him whose timber it is.

- 12) We will not hold for more than a year and a day the lands of those convicted of felony, and then the lands shall be handed over to the lords of the fiefs.
- 13) Henceforth all fish-weirs shall be cleared completely throughout all England, except along the sea coast.
- 14) Let there be one measure for wine throughout our kingdom, and one measure for ale, and one measure for corn, and one width for cloths.
- 15) No bailiff shall in future put anyone to manifest trial or to oath upon his own bare word without reliable witnesses produced for this purpose.
- 16) No free man shall in future be arrested or imprisoned or disseised of his freehold, liberties or free customs, or outlawed or exiled or victimized in any other way, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we refuse or delay right or justice.
- 17) All merchants, unless they have been publicly prohibited beforehand, shall be able to go out of and come into England safely and securely and stay and travel throughout England, for buying and selling by the ancient and right customs free from all evil tolls.
- 18) In return for this grant and gift of these liberties, the archbishops, bishops, abbots, priors, earls, barons, knights, freeholders and all of our realm have given us a fifteenth part of all their movables.

11. Petition of Rights (1628)

Parliament and King Charles I fell out over the execution of the Thirty Years' War (1618 -1648) when Parliament refused to grant subsidies to support the war effort. Charles started (a) 'forced loans' without Parliamentary approval; (b) arbitrarily imprisoning those who refused to pay; (c) forced billeting of soldiers within the homes of private citizens; and (d) the declaration of martial law over large swathes of the country. In response, the House of Commons prepared a set of four Resolutions, leading to this Petition that was ratified by the King on 7 June 1628. It intended to counter the overreach of authority by King Charles that became a major infringement on their civil rights. The Petition is considered 'one of England's most famous constitutional documents' of equal value to the Magna Carta and Bill of Rights (1689) and has become basis of constitutions of many countries.

The Petition of Right of 1628 contained four main points:

1. No taxes could be levied without Parliament's consent;
2. No English subject could be imprisoned without cause - thus reinforcing the right of habeas corpus;
3. No quartering of soldiers in citizens homes; and
4. No martial law may be used in peacetime.⁹⁶

12. Bill of Rights (1689)

The Bill of Rights is an Act of English Parliament that guarantees certain basic civil rights.

The Act asserted certain ancient rights and liberties by affirming that:

- 1) the pretended power of suspending the laws and dispensing with laws by regal authority without consent of Parliament is illegal;
- 2) levying taxes without grant of Parliament is illegal;
- 3) it is the right of the subjects to petition the king, and prosecutions for such petitioning are illegal;
- 4) keeping a standing army in time of peace, unless it be with consent of Parliament, is against law;
- 5) Protestants may have arms for their defense suitable to their conditions and as allowed by law;
- 6) election of members of Parliament ought to be free;
- 7) the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament;
- 8) excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted;
- 9) jurors in trials for high treason ought to be freeholders;
- 10) promises of fines and forfeitures before conviction are illegal and void;
- 11) for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliaments ought to be held frequently; and
- 12) no Roman Catholic can inherit the throne of England as it hath been found by experience that it is inconsistent with the safety

⁹⁶ <https://www.britannica.com/topic/Petition-of-Right-British-history>

and welfare of this Protestant kingdom to be governed by a papist prince.⁹⁷

13. United States Declaration of Independence (1776)

The United States Declaration of Independence is the statement adopted by the delegates of American colonies of the Great Britain in Philadelphia, Pennsylvania on July 4, 1776. The Declaration announced that the 13 colonies at war with the Kingdom of Great Britain would regard themselves as thirteen independent sovereign states and then these new states took a collective first step toward forming the United States of America. The relevant provisions are:

- 1) We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness;
- 2) That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed; and
- 3) That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

14. Declaration of the Rights of Man and of the Citizen (1789)

National Constituent Assembly of France approved the Declaration of the Rights of Man and of the Citizen on 26th August 1789, during the period of the French Revolution, as the first step toward writing a constitution for France. The Declaration is inspired by the doctrine of natural rights. The Declaration together with Magna Carta (1215), the English Bill of Rights (1628), the Petition of Rights (1689), United States Declaration of Independence (1776), the United State Bill of Rights greatly inspired the United Nations Universal Declaration of Human Rights (1948). The summary of the Declaration is as follows:

- 1) Men are born and remain free and equal in rights. Social distinctions

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https://www.law.gmu.edu/assets/files/academics/founders/English_BillofRights.pdf

can be founded only on the common good.

- 2) The goal of any political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, safety and resistance against oppression.
- 3) The principle of any sovereignty resides essentially in the Nation. No body, no individual can exert authority, which does not emanate expressly from it.
- 4) Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the fruition of these same rights and these borders can be determined only by the law.
- 5) The law has the right to forbid only actions harmful to society. Anything, which is not forbidden by the law, cannot be impeded, and no one can be constrained to do what it does not order.
- 6) The law is the expression of the general will. All the citizens have the right of contributing personally or through their representatives to its formation. It must be the same for all, either that it protects, or that it punishes. All the citizens, being equal in its eyes, are equally admissible to all public dignities, places, and employments, according to their capacity and without distinction other than that of their virtues and of their talents.
- 7) No man can be accused, arrested nor detained but in the cases determined by the law, and according to the forms, which it has prescribed. Those who solicit, dispatch, carry out or cause to be carried out arbitrary orders must be punished; but any citizen called or seized under the terms of the law must obey at once; he renders himself culpable by resistance.
- 8) The law should establish only penalties that are strictly and evidently necessary, and no one can be punished but under a law established and promulgated before the offense and legally applied.
- 9) Any man being presumed innocent until he is declared culpable if it is judged indispensable to arrest him, any rigor, which would not be necessary for the securing of his person, must be severely reprimanded by the law.
- 10) No one may be disturbed for his opinions, even religious ones, provided that their manifestation does not trouble the public order established by the law.
- 11) The free communication of thoughts and of opinions is one of

the most precious rights of man: any citizen thus may speak, write, and print freely, except to respond to the abuse of this liberty, in the cases determined by the law.

- 12) The guarantee of the rights of man and of the citizen necessitates a public force: this force is thus instituted for the advantage of all and not for the particular utility of those in whom it is trusted.
- 13) For the maintenance of the public force and for the expenditures of administration, a common contribution is indispensable; it must be equally distributed to all the citizens, according to their ability to pay.
- 14) Each citizen has the right to ascertain, by himself or through his representatives, the need for a public tax, to consent to it freely, to know the uses to which it is put, and of determining the proportion, basis, collection, and duration.
- 15) The society has the right of requesting an account from any public agent of its administration.
- 16) Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution.
- 17) Property being an inviolable and sacred right, no one can be deprived of private usage, if it is not when the public necessity, legally noted, evidently requires it, and under the condition of a just and prior indemnity.

15. United States Bill of Rights (1791)

The first 10 amendments to the USA constitution make up the Bill of Rights prohibiting governmental power and these were made in response to calls from several states for greater constitutional protection for individual liberties. These amendments are:

- 1) Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
- 2) A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.
- 3) No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

- 4) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- 5) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
- 6) In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
- 7) In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, then according to the rules of the common law.
- 8) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
- 9) The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

16. Geneva Conventions

The Geneva Conventions comprise four international Conventions (treaties) and three additional Protocols that codify the international humanitarian law for humanitarian treatment in war. In 1949, two 1929 treaties were updated and two new conventions were added. About 200 countries of the world have ratified these treaties. However, the original Geneva Convention was adopted in 1864 to establish the Red Cross

emblem signifying neutral status and protection of medical services and volunteers. The International Committee of Red Cross has been assigned a special role by the Geneva Conventions: it handles, and is granted access to, the wounded, sick, and POWs. The summary of the Conventions is as under:

Convention 1: The Convention was adopted in 1864 and it protects wounded and infirm soldiers and medical personnel who are not taking active part in hostility against a Party. It ensures humane treatment without discrimination founded on race, colour, sex, religion or faith, birth or wealth, etc.

Convention II: This Convention was adopted in 1949, and extended the protections described in the first Convention to shipwrecked soldiers and other naval forces, including special protections afforded to hospital ships.

Convention 1III: The Convention was adopted in 1949, and it defines 'Prisoner of War', and accorded such prisoners proper and humane treatment as specified by the first Convention. Specifically, it required POWs to give only their names, ranks, and serial numbers to their captors. Nations party to the Convention may not use torture to extract information from POWs.

Convention 1V: The Convention was adopted in 1907, and it affords civilians the same protections from inhumane treatment and attack afforded to sick and wounded soldiers in the first Convention. It (a) prohibits attacks on civilian hospitals, medical transports; (b) specifies the rights of internees (POWs) and saboteurs; and (c) discusses how occupiers are to treat an occupied population.

Protocol 1: Adopted in 1977, it (a) furthers restrictions on the treatment of 'protected persons' according to the original Conventions; (b) clarifies terms used in the Conventions; and (c) introduces new rules regarding the treatment of the deceased, cultural artefacts, and dangerous targets (such as dams and nuclear installations).

Protocol 1I: Adopted in 1977, it (a) clarifies further the fundamentals of 'humane treatment'; (b) enumerates specifically the rights of interned persons while providing protections for those charged with crimes during wartime and (c) identifies new protections and rights of civilian populations.

Protocol 1II: Adopted in 2005, it adds another emblem, the ‘red crystal’, to the list of emblems used to identify neutral humanitarian aid workers.

Chapter Three

THEORIES OF HUMAN RIGHTS

1. Natural rights theory

Some theorists believe that man is endowed with certain natural rights and this theory is related to theory of natural law, which for the first appeared in ancient Greek philosophy ⁹⁸ and referred to by Roman lawyer Cicero, the Bible and Catholic philosophers such as Thomas Aquinas. This doctrine of natural laws was used to challenge the absolute divine rights of the rulers and it led to the establishment of a representative government through social contract and legal rights based on natural rights that are beyond the authority of anyone to dismiss.

Different scholars on different premises, such as philosophical reasoning or religious principles, have claimed the very existence of natural rights. Thomas Hobbes (d.1679) conception of natural rights extended from his conception of man in a 'state of nature'. He argued that the essential natural (human) right was 'to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing anything, which in his own judgment, and Reason, he shall conceive to be the aptest means thereunto'. ⁹⁹

Thomas Paine in his book 'Rights of Man' (1791), elaborated inalienability of natural rights emphasizing that these rights cannot be granted by any charter because this would legally imply they can also be revoked and under such circumstances they would be reduced to privileges. ¹⁰⁰

Immanuel Kant (d.1804) claimed that natural rights derive through reason alone whereas the founding fathers of the United States Declaration of Independence declared that it is 'self-evident' truth that 'all men are ... endowed by their Creator with certain unalienable Rights'. Hegel based

⁹⁸ Rommen, Heinrich A., *The Natural Law: A Study in Legal and Social Philosophy* trans. Thomas R. Hanley, O.S.B., Ph.D. (B. Herder Book Co., 1947 [reprinted 1959]), p. 5

⁹⁹ *Leviathan*. 1, XIV

¹⁰⁰ <file:///Users/macair/Desktop/Natural%20Rights%20%7C%20Issue%2010%20%7C%20Philosophy%20Now.webarchive>

the theory of inalienable rights on the *de facto* inalienability of those aspects of personhood that distinguish persons from things. A thing, like a piece of property, can in fact be transferred from one person to another. According to Friedrich Hegel (d.1831), the same would not apply to those aspects that make one a person:

'The right to what is in essence inalienable is imprescriptible, since the act whereby I take possession of my personality, of my substantive essence, and make myself a responsible being, capable of possessing rights and with a moral and religious life, takes away from these characteristics of mine just that externality which alone made them capable of passing into the possession of someone else. When I have thus annulled their externality, I cannot lose them through lapse of time or from any other reason drawn from my prior consent or willingness to alienate them'.¹⁰¹

Similarly, different writers have propounded different lists of what they believe to be natural rights; however, almost all include the right to life and liberty as the two highest priorities: T H Green said, 'if there are such things as rights at all, then, there must be a right to life and liberty, or, to put it more properly to free life'¹⁰² whereas John Locke argued that there are three natural rights:

- a) Life: everyone is entitled to live.
- b) Liberty: everyone is entitled to do anything they want to so long as it doesn't conflict with the first right.
- c) Estate: everyone is entitled to own all they create or gain through gift or trade so long as it doesn't conflict with the first two rights.

The UNDHR (1948) and International Covenant on Civil and Political Rights (1976) have enshrined one conception of natural rights into international law.

2. Utilitarian theory of rights

Utilitarianism is a form of consequentialist moral theory that holds that the right moral action is that which produces the 'greatest happiness for the greatest number'. It rejects any moral code based upon customs or

¹⁰¹ Hegel, *Hegel's Philosophy of Right*, T.M. Knox, trans., New York: Oxford University Press, 1967 (1821), section 66.

¹⁰² T H Green, *Lectures on the Principles of Political Obligation*, Law Book Exchange Ltd, NJ, USA, 1883, p.114.

traditions, or that handed down by a leader or God. It holds that it is only the 'consequences' of an action that are relevant, and that too only those consequences, which affect the amount of pleasure or happiness in the world. The goal is to maximize utility, the net amount of happiness or pleasure in the world, and to achieve this, the consequences to everyone affected by an action must be taken into account.

The Greek hedonists philosophers Aristippus (d.356 BC) and Epicurus (d.270 BC) viewed happiness as the only good; however, the modern tradition of utilitarianism properly began with Bentham (d.1832), John Stuart Mill (d.1873) who popularized the word 'Utilitarianism') and Henry Sidgwick (d. 1900). Jeremy Bentham is considered to be the founder of modern utilitarianism. He has described utility as the sum of all pleasure that results from an action, minus the suffering of anyone involved in the action i.e. the greatest happiness of the greatest number (GHGN).

In his book, 'An Introduction to the Principles of Morals and Legislation' (1780) Bentham begins with that 'nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do... By the principle of utility is meant that principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words to promote or to oppose that happiness. I say of every action whatsoever, and therefore not only of every action of a private individual, but of every measure of government'.

In legal-political theory, in Bentham's time, human rights were not spoken of. He himself used the term 'natural rights'. This expression is replaced by 'human rights', still used today and human rights, then, are the result of a metamorphosis suffered by natural rights. Human rights and natural rights are not the same, but they originate from and owe some of their characteristics to them; however, both, essentially and practically, human and natural rights share the claim that both precede positive law.

Bentham views arose from the contemplation of the events that happened during the American and the French, revolutions. He was appalled by the bloodcurdling spectacle offered by all France, and above all, by Paris: 'maddened crowds cheering on to their death carts full of people, a democracy reduced to a parliament led by demagogues

devouring each other, the refinement of techniques of totalitarian control of the population through political and police terror’.

However, a closer analysis indicates that Bentham rejected natural rights theory on the following grounds:

- a. He has an empirical attitude: Theoretically, natural rights precede positive law and prior to the order given by someone that the senses can perceive; they proceed from the Creator or Nature, from a nature personified and principled; natural rights are metaphysical. To him, the metaphysical either does not exist, or he cannot perceive it, which comes to the same thing; so natural rights are ‘nonsense upon stilts’, ‘nonsense under the pallium’, or ‘absurdities that have been put into an eminent position for the people to admire, and to be amazed by them, without being able to distinguish their quality, real or phantasmagorical’.
- b. Bentham also had epistemological reasons: It arose from the differentiation and separation of ‘be’ and ‘ought to be’ established by Hume: that things are in a certain way has nothing to do with how they ought to be; the physical and the moral are heterogeneous and their communication would generate a logical inconsistency’.
- c. His analytical method: he has a genuine Enlightenment attitude; the analytical method demands that any reality is broken down into its simplest units, into its elements, and it cannot be divided further. This elemental unit must correspond to an empirically perceptible reality just as such a unit. If not, we do not have a reality in the true sense, but only in the figurative, a fiction. For a man of the Enlightenment, a fiction is a dangerous thing, like old wives’ tales, they produce a distorted, unreal vision, a deformation that usually covers up some spurious interest. It is the mission of the philosopher, even more of the social scientist, to reveal fictions, to tear away the veil of mystery that shrouds reality so that this appears just as it is. Natural rights are fictions’.¹⁰³
- d. Human reason does not deal with rights prior and superior to positive law, to law empirically provable, but what has traditionally come to

¹⁰³ Manuel Escamilla, Rights and Utilitarianism. John Stuart Mill’s Role in its history
: <https://journals.openedition.org/etudes-benthamiennes/192>

be called, ‘subjective rights’ whereas the rights shall be ‘legal rights’, or ‘juridical rights’.

- e. Pre-legal rights or natural rights are contrasts of political correctness that demand justice. These are not based on reasons of opportunity, but on ‘non-negotiable principles’. ¹⁰⁴

Bentham introduces a ‘hedonic calculus’, a method of calculating the value of pleasures and pains: ‘the value of a pleasure or pain, considered by itself, can be measured according to its intensity, duration, certainty/uncertainty and propinquity/remoteness’; ‘the tendency of any act by which it is produced’; and consider the extent, or the number of people affected by the action. It appears that Utilitarianism is a version of consequentialism that means that the consequences of any action are the only standard of right and wrong.

Mill in his book, ‘Utilitarianism’ (1863) rejects a purely quantitative measurement of utility and says: ‘It is quite compatible with the principle of utility to recognize the fact, that some kinds of pleasure are more desirable and more valuable than others’. To Mill, ‘utility is used to mean general well-being or happiness’, and that ‘utility is the consequence of a good action’. Mill argues that people perform actions for social utility (the well-being of many people): that people really desire happiness, and since each individual desires their own happiness, it must follow that all of us desire the happiness of everyone, contributing to a larger social utility. He also argued that “intellectual pursuits have value out of proportion to the amount of contentment or pleasure (the mental state) that they produce” and that people should pursue these grand ideals, because if they choose to have gratification from petty pleasures, “some displeasure will eventually creep in. We will become bored and depressed’.

Karl Popper in his seminal work, ‘The Open Society and its Enemies’ (1945), argues that the principle ‘maximize pleasure’ should be replaced by ‘minimize pain’ because from the ethical point of view, there is no symmetry between suffering and happiness, or between pain and pleasure as human suffering makes a direct moral appeal, (appeal for

¹⁰⁴ For details see: <https://journals.openedition.org/etudes-benthamiennes/192>, Manuel Escamilla article.
<https://www.utilitarianism.com/utilitarianism.html>
<https://plato.stanford.edu/entries/utilitarianism-history/>
<https://www.iep.utm.edu/bentham/>

help), while there is no similar call to increase the happiness of a man who is doing well anyway'.¹⁰⁵

The followers of utilitarianism have disputed a number of points:

- (a) Whether actions should be chosen based on their likely results (act utilitarianism); or
- (b) Whether people should conform to rules that maximize utility (rule utilitarianism); or
- (c) Whether total (total utilitarianism), average (average utilitarianism) or minimum utility should be maximized.

Some theorists, amongst them Dowrkin, Nozic and John Rawls are the leading ones, strongly propound that the priority of the wellbeing of the majority as stated by the utilitarian philosophers is not the prime objective of the State. They argue that the welfare of the majority of the people might lead to detrimental consequences as far as the welfare of a particular person or a group of persons is concerned; therefore, there has to be proper reconciliation between the well-being of the majority and individual (or minority) well-being for the better enjoyment of civil, political, social and cultural rights. Today, the demand for right to development on international level is perhaps the manifestation of this theory.

The principle of 'aggregation' has been severally criticized for being a mere sum total of 'utilities' that rules out any distributive considerations. Beyond the issue of equality, the utility principle is likely to justify the sacrifice of minorities as utilitarianism may force individuals to sacrifice something to benefit others, including total strangers e.g., utilitarianism is likely to justify the execution of innocent people to prevent rioting and consequent numerous deaths, where raising the general welfare is presented as a serious justification for the innocents' deaths.¹⁰⁶

A common objection to utilitarianism is the inability to quantify, compare, or measure happiness or well-being: 'One objection to this interpretation of utility is that there may not be a single good (or indeed any good) which rationality requires us to seek. But if we understand 'utility' broadly enough to include all potentially desirable ends-pleasure,

¹⁰⁵ For details see: <https://www.iep.utm.edu/util-a-r/>

¹⁰⁶ Antoinette Baujard. Utilitarianism and anti-utilitarianism. Working paper GATE 2013-32 . 2013. <https://halshs.archives-ouvertes.fr/halshs-00906899/document>

knowledge, friendship, health and so on—it's not clear that there is a unique correct way to make the trade-offs between different goods so that each outcome receives a utility. There may be no good answer to the question of whether the life of an ascetic monk contains more or less good than the life of a happy libertine—but assigning utilities to these options forces us to compare them'.¹⁰⁷

Utilitarianism is alleged to ignore justice as H. J. McCloskey wrote: 'Suppose that a sheriff were faced with the choice either of framing a Negro for a rape that had aroused hostility to the Negroes (a particular Negro generally being believed to be guilty but whom the sheriff knows not to be guilty)—and thus preventing serious anti-Negro riots which would probably lead to some loss of life and increased hatred of each other by whites and Negroes—or of hunting for the guilty person and thereby allowing the anti-Negro riots to occur, while doing the best he can to combat them. In such a case the sheriff, if he were an extreme utilitarian, would appear to be committed to framing the Negro'¹⁰⁸ and surely the utilitarian must admit that whatever the facts of the matter may be, it is logically possible that an 'unjust' system of punishment—e.g. a system involving collective punishments, retroactive laws and punishments, or punishments of parents and relations of the offender—may be more useful than a 'just' system of punishment'?

Various critics have attacked utilitarianism's assertion that wellbeing is the only thing with intrinsic moral value. Marx criticizes utilitarianism on the grounds that it does not appear to recognize that people have different joys in different socioeconomic contexts¹⁰⁹ whereas Henry Sidgwick has asked 'Is it total or average happiness that we seek to make a maximum?'¹¹⁰

3. Legal theory of human rights

The legal theory of rights is antithesis to the theory of natural rights. Advocates of the legal theory argue that the idea of natural law and natural

¹⁰⁷ Briggs, Rachael (2017), Edward N. Zalta, ed., "Normative Theories of Rational Choice: Expected Utility", *The Stanford Encyclopaedia of Philosophy* (Spring 2017 ed.),

¹⁰⁸ McCloskey, H. J. (October 1957), 'An Examination of Restricted Utilitarianism' *Philosophical Review* 66 (4): 466–85

¹⁰⁹ Marx, Das Kapital Volume 1, Chapter 24, endnote 50

¹¹⁰ Sidgwick, Henry (1981), *Methods of Ethics* (7th ed.), , MACMILLAN AND CO., Limited London NEW YORK: <https://www.gutenberg.org/files/46743/46743-h/46743-h.htm>

rights are abstract, ambiguous and ridiculous phenomena; therefore, the
existence of

of a fundamental right of an individual could be better guaranteed, maintained and practiced by the State rather than by the individual himself. Thomas Hobbes, John Austin and Jeremy Bentham are the main proponent of this theory. They argue that rights are purely utilitarian concepts and therefore, the rules and regulations are imperative for the identification and protection of these rights. This theory enables individuals to demand certain specific and recognized rights as granted and guaranteed by the State.

The legal theory has been gravely criticized on the basis that law alone cannot create rights; rather, it declares, recognizes, protects and enforces them whereas customs, traditions and morality are the basis for rights.

In most modern legal systems, certain fundamental rights are conferred and guaranteed by the constitutions. These constitutional rights normally have an absolute priority over any other consideration like Article 8 of the Constitution of Pakistan.

Constitutions also 'entrench' these rights. Entrenchment can be absolute, in which case the rights cannot be removed or altered by any constitutional means (as is the case with some of the 'basic rights' in the German Constitution), or it can be relative, requiring only a more onerous procedure than that for normal legislation (as with the Constitution of the USA).

Sometimes, human rights recognized under international law or treaties are recognized in national law. Therefore, in some European countries, the European Convention on Human Rights, and decisions of the European Court of Human Rights thereon, are considered to be automatically incorporated into national law and override any national law inconsistent with them while in others, such as the United Kingdom, the national courts have, so far as possible, to interpret national legislation to be consistent with the European Convention on Human Rights, but have no legal power to strike down national legislation even if they find it to be clearly inconsistent.

Some rights are conferred by normal national legislation or judge-made in common law tradition. However, many legal rights are not conferred by positive law, but emanate simply from the absence of any law to the contrary. It is probably a practical social necessity that every legal

system has an unwritten ‘closure rule’ to the effect that whatever is not ‘prohibited’ is ‘permitted’. Some types of rights are essentially permissions, and arise in this way e.g. my right to cross the street, for example, is of this nature as no positive law will say that I can do so, and possibly no more general enacted right will imply it.¹¹¹

4. Marxist theory of rights

Karl Marx (d. 1883) put forward a radical theory of human rights in tune with his revolutionary theory of dialectical materialism, class struggle and economic determinism. He said that human rights are simply a bourgeois concept and a by-product of the bourgeois capitalist society primarily designed to maintain and reinforce the predominant position of the capitalist ruling class. He does not include religion, customs, tradition and morality as integral components of human rights; rather argued otherwise.

Marx regards the State as a coercive agency to uphold the particular type of social organization; therefore, he argued in favour of abolition of the institution of State. To him, law, being a part of the super structure and economic relations as an infrastructure, is a tool of the State that perpetuates and safeguards the vested economic interests of the dominant class in the society; hence, he advocated a classless society as well as he firmly believes that rights can exist and flourish only in a classless society where all are equal and no one is an exploiter.

The critique of human rights formulated in his book ‘The Jewish Question’ is usually awarded the canonical status of a definitive dogma that says that human rights are an ideology which serves the constitutive egoism of civil society while simultaneously exposing this society’s alienation through the quasi-schizophrenic division it establishes in the society. Marx railed against ‘objectification’, and believed that individuals possess an intrinsic moral importance.

Marx criticizes the abstraction of human rights on the basis that ‘political emancipation’ must lead to ‘social emancipation’. However, in his political struggle, Marx always believed that the acquisition of certain

¹¹¹file:///Users/macair/Desktop/Legal%20Rights%20(Stanford%20Encyclopedia%20of%20Philosophy)

rights of man is a necessary prerequisite for any progress towards socialism; therefore, he repeats in his writings the popular liberal political watchwords: universal suffrage, the right to peaceful assembly and association, freedom of the press and public education uncensored by the state.

Marx has great qualms with human rights and emphasizes the significance of human emancipation while criticizing the political revolution already undergone via regime changes seen in France and the United States. He believed that human emancipation freeing man of all bonds, including economic, is more effective than a regime change masquerading as political emancipation. He predicted that in the long run, the state and other institutions will wither away and the capitalist political economy will be dissolved, then humanity will enjoy full emancipation and freedom, and defined rights will be rendered unnecessary.

According to Marx, the freedoms offered by human rights under liberal capitalism are not real freedoms; rather they serve only to constrain the individual and alienate him from his fellow man and society and communism will eliminate any need for liberal bourgeois rights.

Karl Marx says that human rights are 'the rights of egoistic man, of man as a member of bourgeois society, that is to say an individual separated from his community and solely concerned with his self-interest'¹¹² and these alleged universal rights of the abstract individual would in reality promote the interests of one particular social type: the possessive individual of capitalism of bourgeois ideology, the ideology which having drowned all emotion 'in the icy water of egotistical calculation' and having ripped apart all feudal ties, leaving behind 'no other nexus between people than naked self-interest.'¹¹³ However, it does not mean that Marx was against human rights but he has his own philosophy of human rights focusing more on social, economic and cultural rights based on his own interpretation of history.

Fundamental rights like democracy, freedom, and equality appear to him as self-evident but he severally criticizes if democracy is exclusively political, that equality should not extend further than the ballot box, and the freedom proclaimed by the Constitution should not prevent the

¹¹² Karl Marx, *La question juive* [1843] (Paris: Union générale d'éditions, 1968)

¹¹³ Karl Marx, Friedrich Engels, *Communist Manifesto* [1848], trans. Samuel Moore (Harmondsworth: Penguin, 1967), 21

enslavement of the proletariat, or the twelve-hour workdays of women and children as freedom 'is a general human right'. To him, social emancipation does not go against political emancipation as the social emancipation fulfils or completes the political freedom by extending political freedom to the social sphere.

Marx put forward the project of social emancipation within an analysis of the historical dynamics of capitalist accumulation. He criticized the "distributive justice" that did not comprehend that property relations should be analysed in their 'real form' as the 'relations of production as Marx denies any other normative perspective than that of a 'critical knowledge of the historical movement, a movement which itself produces the material conditions of emancipation'.

Marx argues that human rights are presented as the realization of a system for the equality of individual rights; however, this configuration overlooks the fact that real 'social relations' are 'based on class antagonism', and that they are 'not relations between individual and individual, but between worker and capitalist, between farmer and landlord, etc.'.

Marx always believed that the total destruction of inequality as established by birth, tradition or any other ground is one of the great achievements of the capitalist market and of its corresponding legal system; therefore, he flaunts 'the commodity' as a 'great cynical equalizer' and 'capital' as 'a born leveller'.¹¹⁴

The Marxists challenge the right of equality, valued much in Western systems, on the ground that there are various sorts of inequalities, so such a right has no validity in fact because the elites, bourgeois class and other powerful classes control the state institutions and the judiciary interprets the laws to safeguard the interests of the powerful persons; therefore, the proper implementation of right to equality before law necessitates equality in the distribution of economic resources as 'right instead of being equal would have unequal'. This objective can only be achieved in a communist society.

The early socialists had unshakeable faith in 'just remuneration' for work and the 'just distribution' or 'fair exchange' of goods. Marx while

¹¹⁴ K. Marx, *Le Capital*, Book I, Ch. II and XIII, 3, 97

targeting the early socialists' this slogan of 'distributive justice' ridicules it as 'obsolete verbal rubbish'. He puts forward communism as the possibility, offered to each individual, for the 'integral development' of individuality.

Marx criticizes the right to private property pointing out that private property is no longer a reality for the proletariat. Even if a state allows owning property, there are no real safeguards against a few wealthy individuals to take over especially when the population is converted into an army of wage laborers. Furthermore, the right to private property allows for exclusion, selfishness, and greed.

Under a capitalistic system, exploitation of the working class increases leading to widespread poverty and while wealth accumulates as capital in the hands of the owners of production, the proletariat as a class has nothing and the proletariat and the political-economic system at large resorts to the practice of immoral practices.

The alienation of labour forms the basis of Marx's main criticism of human rights. The capitalist political economy has no respect for human rights, as the workers are alienated from their own humanity. Marx argues, "... it is clear that the more the worker spends himself, the more powerful the alien objective world become which he creates over-against himself, the poorer he himself -- his inner world -- becomes, the less belongs to him as his own. It is the same in religion. The more man puts into God, the less he retains in himself".¹¹⁵

He refuted the thesis put forth by Bruno Bauer, that particularism or the adherence to a specific religion justifies the exclusion of that group or individual from the protection of human rights. Marx asks to counter Bauer (who refuses to grant Jews equal rights): 'does the standpoint of political emancipation give the right to demand from the Jew the abolition of Judaism and from man the abolition of religion?'¹¹⁶

Marx thought that the modern state does not have the right to discriminate against Jews, as compared to Christians, nor does it have the

¹¹⁵ <https://owlcation.com/social-sciences/Karl-Marxs-Criticism-of-Human-Rights>

¹¹⁶ Marx, *La question juive*, the most recent French translation of this work, completed by Jean-François Poirier for La Fabrique (2006), eliminates the reference to the word "right" [*"droit"*], which existed in the first translation done by Jean-Michel Palmier for Éditions sociales (1971), and substitutes instead "is it permitted that" [*permet-il*]. And yet the word found in the original text is indeed "Recht".

right to demand atheism as a requirement for citizenship. At the same time, Marx advocated the complete abolition of religion as a part of the communist revolution as separation of church and state is not sufficient to solve the ills of society. Marx criticizing the liberal ‘freedom of conscience’ terms it ‘old catchword’ of liberalism, and predicts that Workers’ party will ‘endeavours rather to liberate the conscience from the witchery of religion’¹¹⁷ and that ‘everyone should be able to attend his religious as well as his bodily needs without the police sticking their noses in’.¹¹⁸

Briefly speaking, Karl Marx’s chief concerns are social and economic rights of the poor working classes and the contribution of Marxist thought can be clearly found in the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976, whose development and approval was chiefly asserted by the socialist world that was under the doctrinal influence of Marx.

5. Social welfare theory of rights

The Social Welfare Theory of human rights holds that human rights are conditions of social welfare. These are the purely creation of human society, and law, customs, traditions and the natural rights ‘should all yield to what is socially useful or socially desirable’.

The question arises as what is socially useful? The test is ‘the greatest happiness of the greatest number’. Take, for example, the right to free speech; it is not an absolute right and it is limited by the social needs of the society. Similarly, the right to hold property does not imply the right of the few to be richer at the cost of the many people.

The Utilitarian philosophers like Jeremy Bentham and J S Mill are the real advocates of the Social Welfare Theory of Rights and they have set up the principle of the greatest happiness of the greatest number and have made it the criterion for the measurement of utility of any right though the utility, they believed, should be determined by considerations of reason and experience.

¹¹⁷ K. Marx, Critique du programme de Gotha, 78

¹¹⁸ For more details see: https://www.cairn-int.info/article-E_RFSP_623_0433--was-karl-marx-truly-against-human-rights.htm

Harold Laski (d.1950), English political philosopher, too, accepts utility as the very basis of rights, though he gave to the term a modified meaning consistent with the modified conditions of his times. He agrees that the test of a right is utility, and that, in tune with socialist tradition, the utility of a right is its value to all the members of the State. He argued that the claims, which the State must recognize 'are those which, in the light of history, involve disaster when they are unfulfilled'. He further argued that rights are not independent of society, but inherent in it. 'We have them for its protection as well as our own. Rights, therefore, are correlative with functions'. 'We have rights so that we may contribute to the common good. My rights are built upon my contribution to the wellbeing of society'. 'I cannot have rights against the public welfare, for that, ultimately, is to give me rights against a welfare which is intimately and inseparably associated with my own'. Therefore, rights, as such, are built upon their utility to the individual and the community.¹¹⁹

Laski defines rights as 'those conditions of social life without which no man can seek, in general, to be himself at his best'. To him:

(a) Rights are, in fact, social concept and deeply connected with social life;

(b) The essentiality of rights is established by the fact that individuals claim them for the development of their best self;

(c) Rights, individuals and state are on the same plank in the sense that they cannot be separated from each other and there is no antagonism between them;

(d) It is the primary duty of the state to help the individual in his efforts to achieve his best self and the state has a responsibility in the field of realization of rights; and

(e) Rights completely depend upon the institutions and recognition of state; an individual cannot claim rights if those are not recognized by the state; a mere recognition is not sufficient for the exercise of rights; the state must, through law and institutions, implement the rights.

Apparently, this theory seems attractive, but it is highly questionable as:

¹¹⁹ <http://www.politicalsciencenotes.com/theory-of-rights/theory-of-rights-laski-barker-and-marxists-theories/781>

- (a) It makes a mistake by making rights upon the state'
- (b) 'State recognizes rights' but it does not mean that it creates rights;
- (c) Rights existed prior to state;
- (d) The validity of rights is not derived from the recognition; and
- (e) There are many rights, which are not recognized by many states.

The Social Welfare Theory of Rights has many sympathizers but one cannot say what social welfare actually means? Does it mean 'the greatest happiness of the greatest number', 'majority interest', or what is today understood to be 'the common good'? Under Communism, in fact, many political and economic wrongs have been committed in post-World War II era to the individuality of man in the name of social or collective good. It is not rational and useful to sacrifice the individuality and rights of man at the altar of social good and a political or social system, which belittles individual personality and glorifies the common interest of society cannot create a healthy and sustainable society.¹²⁰

6. Idealistic theory of human rights

The Idealistic theory of human rights, also termed as 'personality theory', considers human rights as the external conditions essential to ethical, internal or real development of man. It describes the system of rights as 'the organic whole of the outward conditions necessary to the rational life' or 'that, which is really necessary to the maintenance of material conditions essential to the existence and perfection of human personality'. It emphasizes the creation of those necessary conditions, which enable man to reach the fullest stature of his personality.

Immanuel Kant (d. 1804), a leading idealist, seldom uses the expression 'human rights'. Kant claims, 'the rights of man must be held sacred; however, great a sacrifice the ruling power may have to make'; 'humans have an innate right to freedom 'by virtue of their humanity'. He argued that it 'is only a legitimate government that guarantees our natural right to freedom, and from this freedom we derive other right'. To him, these 'righteous laws' are founded upon three rational principles:

¹²⁰ For more details see:

https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4194&context=fss_papers&sei
<http://www.shareyouessays.com/essays/short-essay-on-social-welfare-theory-of-rights/88873>

- a. The liberty of every member of the society as a man; the liberty of individuals is important because the state cannot be allowed to dictate the lives of individuals; only a 'paternal government' can dictate while the liberty of individuals can only occur within a patriotic government.
- b. The equality of every member of the society with every other, as a subject; this equality for each member is important to have a common basis for everyone within the state and equality is the basis from which rights for every human being originate; and
- c. The independence of every member of the state as a citizen; if by any reason, a member of society cannot act in an independent way without the guidance of the state, there would be no need for rights; this concept of independence causes the formation of rights within the political context.

According to Kant, 'there is only one innate right' i.e., freedom, understood as 'independence from being constrained by another's choice'. His arguments can be summarized as under:

- a. Humans are autonomous; □
- b. This property bestows on them a status which entitles them to respect, understood as a guarantee not to be treated as mere means; □
- c. Any arbitrary limitation of the freedom of some members of the society amounts to treating □ them as mere means, i.e., as a failure to respect them in the required manner; □
- d. The only a priori limitation of external freedom permitted is that necessary to make the □ external freedom of one compatible with that of all others; □
- e. Any individual has a pre-political, inborn right to the maximum amount of freedom compatible with the same freedom of all others; and □
- f. All humans have a pre-political, inborn right to external freedom and formal equality. □

Kant would condemn the tendency to water down the universals of justice and consider the worldwide violations of the right to freedom and formal equality as inexcusable for cultural or religious reasons. At the same time, he would also condemn the contemporary tendency to impose violently these *minima moralia*, a prudence that many think incompatible with a commitment to universal standards.¹²¹

Friedrich Hegel (d. 1831) explains his conception of rights in the development of ‘the idea of the absolutely free will’ through Abstract Right, Morality, and Ethical Life. Each of these divisions is further subdivided triadically:

- a. Under Abstract Right there is Property, Contract, and Wrong;
- b. Under Morality falls Purpose and Responsibility, Intention and Welfare, and Good and Conscience; and
- c. Under Ethical Life come the Family, Civil Society, and the State. These last subdivisions are further subdivided into triads, with fourth level subdivisions occurring under Civil Society and the State.¹²²

Another theorist of the idealist theory is Thomas Hill Green (d. 1882), primarily concerned with ‘moral rights’ i.e. those rights which are justified and recognized on ethical and not purely legal grounds. Moral rights exist prior to the state and law and the role of the state is to uphold the rights, which originate in society as part of the unfolding of the eternal consciousness. To him, moral rights cannot exist without reference to their existence as members of a society founded on a common purpose; hence, moral rights are necessarily social.

Green did not believe that men could possess ‘natural rights’ in a ‘state of nature’-‘A law is not good because it enforces ‘natural rights’, but because it contributes to the realization of a certain end’ that is ‘the control of the conduct of men according to certain regular principles by a society recognizing common interests’ because a shared conception of a collective end, a common good, is the basis of society's existence, and is also the basis of the individual's existence as a moral agent.

Green claims that by virtue of his possession of rights within a

¹²¹ For details see: Luigi Caranti. Kant’s Theory of Human Rights: <http://www.kant-online.ru/en/?p=424>

¹²² <https://www.iep.utm.edu/hegelsoc/>

particular society, the individual has the right to non-interference from all members of all societies. He extends it in this manner because he holds that all individuals should respect the moral agency of anyone who is recognized as a moral agent by anyone else.

Green allows moral rights to criticize legal rights and argues that the individual has a duty to resist the law when his conscience tells him that the law fails to foster the development of his fellow citizens but with one qualification that it should only be resisted where the effect on the state would not be so severe as to seriously undermine the social development which it generally supports.¹²³

However, different idealist thinkers differ on the role of the state in creation and protection of human rights. According to the idealists like Kant and Green, conditions for the individual's ethical and moral development are created by the State whereas extreme idealists like Hegel subordinate the individual to the State, and expect the individual to surrender himself completely to the State.¹²⁴

7. Historical theory of rights

The historical theory of rights claims that rights are the result of historical evolution and these are not creation of law or state. In earlier times, human rights were based on customs and usages as in the course of history, human beings in society evolved certain usages, traditions and customs for the common good, and these unwritten norms became the basis of law, which codified customs in actual written form.

¹²³ <https://plato.stanford.edu/entries/green/>

¹²⁴ http://shodhganga.inflibnet.ac.in/bitstream/10603/86909/9/09_chapter%202.pdf

In other words, the historical theory of rights says that rights are the product of history and they have their origin in customs, which once possessed practical social utility and passed on from one generation to another, ultimately having been recognized as inherent claims or rights and custom is their sanction.

Edmund Burke (d.1797) maintains that the French Revolution (1789) was based on the abstract rights of man (liberty, equality and fraternity), whereas the English Revolution (culminating in Glorious Revolution 1688) was based on the customary rights of the people and reassertion of the historic liberties of Englishmen, which had found due expression in the Magna Carta (1215), the Petition of Rights (1628), and various other documents of constitutional importance.

All historical customs are not conducive to creation of human rights and all products of history or custom cannot be regarded as rights or continued as rights. For example, in some regions and countries in ancient and medieval times and even afterwards, buying and selling slaves was an established custom or right of the slave-dealer or slave-buyers. Therefore, we can safely say that some long-standing customs can come in the way of rights instead of becoming rights themselves.

In other words, the historical theory of human rights considers rights as a function or product of culture and social environment and attaches a great importance to time and space; however, this theory has some distinctive drawbacks:

- a. This theory sometimes does not consider an individual as a separate and independent entity outside its society or community;
- b. This theory gives more importance to culture, religion or language of the people instead of the actual views of the people; and
- c. This theory undermines the universality of the human rights by heavily focusing on the differences between societies that are considered as fountains of the human rights.

Chapter Four

INTERNATIONAL LAW AND HUMAN RIGHTS

1. Introduction

International law, also called public international law or law of nations, is the body of legal rules, norms, standards, principles, practices, and assertions coupled with increasingly sophisticated structures and processes, that apply between sovereign states and other entities that are legally recognized as international actors. The term was initially coined by the English philosopher Jeremy Bentham (1748–1832) who defined international law as a collection of rules governing relations between states. This original definition omits individuals and international organizations that are now the most vital elements of modern definition of international law.

International law is an established legal order and not an ethical principle, but it has been significantly influenced by ethical principles and concerns, particularly in the sphere of human rights law. International law is different from international comity, which means legally nonbinding practices adopted by states for reasons of courtesy (e.g., the saluting of the flags of foreign war ships at sea). It is also distinguished from the field of Private International Law or Conflict of Laws, which is concerned with the rules of municipal law (domestic law) of different countries where foreign elements are involved. The international law is rarely enforced by military means or even by the use of economic sanctions; rather, system is sustained by bilateralism or reciprocity or a sense of enlightened self-interest.

International Human Rights are a new branch of International Law. We will briefly discuss processes, sources, and some basic political and jurisprudential assumptions as a background for the better understanding of International Law aspects of the human rights.

What are the sources of International Law where there is no Code of International Law or International law has no Parliament to legislate? There is an International Court of Justice and many other specialized international courts and tribunals but their jurisdiction is normally dependent upon the consent of States and they lack a compulsory jurisdiction like that possessed by national courts. Therefore, we can argue that international law is made largely on a decentralized basis by the actions of the States, which make up the international community.

2. Sources of International Law

Article 38 The Statute of the International Court of Justice (ICJ), whose function is to decide in accordance with international law such disputes as are submitted to it, identifies the following five sources:

- (1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (2) International customs, as evidence of a general practice accepted as law;
- (3) The general principles of law recognized by civilized nations;
- (4) Subject to the provisions of Article 59 (stating that decisions of the Court have no binding force except between the parties to the case), judicial decisions; and
- (5) The teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rule of law.

(1) Customs: Article 38(1)(b) of the Statute states that the International Courts of Justice shall apply ‘international customs, as evidence of a general practice accepted as law’.

It is the oldest and original source of international law and generates rules binding on all the States. Customary law is not a written source. It is indispensable to understand human rights law. It means conduct or conscious abstention of a state from certain conduct.

Hudson describes the character of the state practice that can become a customary rule of law:

- (a) Concordant practice by a number of states relating to a particular situation;
- (b) Continuation of that practice over a considerable period of time;
- (c) A concept that the practice is required by or consistent with international law; and
- (d) General acquiescence in that practice by other states.¹²⁵

The ICJ has declared that 'Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The States concerned must feel that they are conforming to what amounts to a legal obligation.'¹²⁶

A new rule of customary international law cannot be created unless both of the referred above elements are present:

- (a) Practice alone is not enough;¹²⁷
- (b) Nor can a rule be created by *opinio juris* without actual practice.¹²⁸

Practice includes not only just the practice of the government of a State but also of its courts and parliament. It includes what States say as well as what they do. The ICJ's decision in the *Nicaragua* case explains this point: 'In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.'¹²⁹

Similarly, *opinio juris*, includes a belief in obligation (the *North Sea Continental Shelf* cases (1969) and assertion of a legal right or the acknowledgment of a legal obligation.

Section 102 of the Restatement (third), Foreign Relation Law of the United States provides in Clause (2) that Customary International Law results from a general and consistent practice of states followed by them from a sense of legal obligation. According to Brownlie duration, (less significant when there is generality and consistency) uniformity, generality of the practice and *opinion juris et necessitates* (sense of legal obligation) are the basic elements of the custom.

Once there is sufficient persistent practice together with established *opinio juris*, a new customary rule emerge. Subject only to what is known as the 'persistent objector' principle (that a state has always objected on it) the new rule binds all States. The persistent objector principle allows a State to avoid its application.

(2) Treaties: The Court is instructed to apply an International convention, whether general or particular, establishing rules expressly recognized by the contesting states. Thus treaties appear first on the list and have become primary and the most effective expression of International Law towards regulation of many contemporary problems and a principal means for development of human rights movements.

¹²⁵ Working Paper on Act 24, *Statute of the International Law commission*, March 1950.

¹²⁶ *North Sea Continental Shelf* cases, ICJ Reps, 1969, p. 3 at 44

¹²⁷ *The Case of the SS Lotus* (1927)

¹²⁸ *The Advisory Opinion on Nuclear Weapons* (1996)

¹²⁹ ICJ in *Nicaragua* ICJ Reps, 1986, p. 3 at 98

The terminology for this voluminous and diverse body of International Law varies. International agreements are interchangeably referred to as pacts, protocols, covenants, conventions, and charters, exchanges of notes and concordats as well as treaties.

Treaties are more accurately described, as sources of obligation under law but many treaties are also authoritative statements of customary law on the points involved. A treaty, which is freely negotiated between States is often codification what were previously unwritten rules of customary law e.g. the Vienna Convention on the Law of Treaties, 1969. More than half the States in the world are parties to it but every court has treated its main provisions as codifying customary law; hence, applicable to all States whether they are parties to the Convention or not. Moreover, where a treaty provision is not intended to be codificatory but is an innovation designed to change the rule, it can become part of customary law if it is accepted in practice.¹³⁰

In domestic frame of work, some treaties resemble a private accord (agreement over boundaries); others are closer to private contracts or to domestic legislation (agreement over rules to navigation) but domestic legislation differs in several respects from the treaty. A domestic legislation is generally enacted by majority of the legislature and binds all members of the relevant society. The treaty, on the other hand, is a consensual agreement.

With few exceptions, such as Article 2(6) of the UN Charter, it purports to bind or benefit only parties and alteration of terms generally requires the consent of all. The treaty shares a contracts consensual basis and has preserved Roman law flavour, (*pacta sunt servanda*) i.e. pacts must be respected. Article 26 of the Vienna Convention on the law of Treaties says: ‘every treaty in force is binding upon the parties to it and must be performed by accepting them in good faith’.

Under Article 2(1)(d) of the Vienna Convention, a party to a Treaty can make a unilateral statement accepting a Treaty ‘whereby it purports to exclude, or vary the legal effect of certain provisions of Treaty in their application to a state’. In multilateral Treaties this poses serious problems. A Treaty’s text may also permit some reservations. Article 19 of the Vienna Convention provides that a state can formulate reservation unless it is ‘incompatible with the object and purpose of the treaty’. A state faced with reservations by another state must make its objections formally known if it is to prevent reservation from becoming effective as to it.

Article 31 of the Vienna Convention provides that a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose’. Article 32 goes on to add that the recourse may be had to supplementary means if interpretation pursuant to Article 31 produces a meaning that is ‘ambiguous, or obscure’ or its outcome is ‘manifestly absurd or unreasonable’. Sometimes, courts look into the legislative history or travaux préparatoires to achieve unambiguous and unreasonable meaning.

(3) General principles of law: Article 38 (1)(c) of the Statute says that the court can apply the general principles of law recognized by civilized nations. General principles of law recognized by civilized nations are rarely mentioned in judgments and they are employed where the ICJ or another international tribunal wants to adopt a concept such as the legal personality of corporations (e.g. in the *Barcelona Traction Co.* case (1970)), which is widely accepted in national legal systems. But international law seldom adopts in its entirety a legal concept from a particular national legal system; instead the search is for a principle, which in one form or another is recognized in a wide range of national legal systems.

¹³⁰ (ICJ Reps, 1969, p. 43)

A recurrent criticism is that the term ‘civilized nations’ is problematic, given its apparent vagueness and the presumption that some nations may be ‘uncivilized’. The predominant scholarly viewpoint, and which has received judicial endorsement, is that the notion is founded upon developed legal systems and, therefore, includes all but the most primitive of societies.¹³¹

Similarly, the precise legal meaning of the ‘general principles of law common to all civilized nations’, is difficult to agree. Some argue that it encompasses those basic principles of municipal law common to all national systems applicable to international relations while others assert that it refers only to general principles of international law as distinct from specific rules of international law. As a matter of jurisprudence, both legal interpretations have variously been adopted and applied by international tribunals in their adjudication processes.

Examples of general principles of law common to all civilized nations are: non-retroactivity of criminal law, principle of command responsibility, and procedural due process right of a fair trial are granted to all persons charged with the commission of a crime regardless of whether the judicial process is adversarial (common law) or inquisitorial (civil law), or based on the common law tradition or the civil law tradition.

The following categories of general principles of law have been applied in discourses and cases:

- (a) The principles of municipal law ‘recognized by civilized nations; e.g. domestic law rules applicable to such matters as individual rights, contractual remedies, liability in tort, restraint on use of common property are now applied in international law.
- (b) General principles of law, derived from the specific nature of the international community i.e. principals of co-existence, *pacta sunt servanda*, non-intervention, territorial integrity, self-defence and the legal equality of states.
- (c) Principles ‘intrinsic to the idea of law and basic to all legal systems’.
- (d) Principles valid through all kinds of societies in relationships of hierarchy and coordination. The principles called *jus rationale* is valid in all human societies and is associated with natural law doctrine based on the presumption that human person is a rationale and social creature.
- (e) Principles of justice founded on the very nature of man as a rational and social being. This is based on principle of natural justice, known in many municipal legal systems. It means minimum standards of decency and respect for individual human being.

(4) Judicial decisions: Article 38 of the Statute of the International Court of Justice (ICJ) describes ‘judicial decisions’ as a ‘subsidiary means for the determination of the rules’. Judicial decisions are subsidiary means as these are only evidence of the state of the law. The judicial decisions include the decisions of international courts, tribunals and higher national courts. However, the preponderant view is that judicial decisions are ‘in the narrowest sense not a true source of international law’ but the court has striven to follow its previous judgments and insert a measure of certainty within the process.

The International Court of Justice only applies the law. Under Article 59 of the Statute of the Court, its decisions have no binding force except as between the parties and in respect of that particular case (Article 59). However, its decisions have a role in the progressive development of the international law. The Court does not observe the doctrine of precedent, technically referred to as *stare decisis*, but still it strives to maintain judicial consistency.

¹³¹ Bledsoe RL, Boczek B (1987) The international law dictionary. Clio Press Ltd., Oxford, Brownlie, I (1990) Principles of public international law, 4th edn. Oxford University Press, pp. 28–29.

The Court has referred to particular arbitral awards on only four occasions but on other occasions has referred compendiously to the jurisprudence of international arbitration. The European Court of Justice has also decided many issues of general importance. The decisions of national courts have evidential value about the practice of states and the publicists normally refer to them.

Article 38(1)(d) does not distinguish between decisions of international and national courts. The former are generally considered the more authoritative evidence of international law on most topics (though not those which are more commonly handled by national courts, such as the law on sovereign immunity). But decisions of a State's courts are a part of the practice of that State and can therefore contribute directly to the formation of customary international law.¹³²

(5) Teachings of publicist: According to Article 38 of the Statute of the ICJ, 'the teachings of the most highly qualified publicists of the various nations' do constitute a 'subsidiary means for the determination of the rules of law'. Generally, opinions of publicists are assumed to be on the same footing as judicial decisions as secondary sources of international law.

They not only describe the law but also sometimes have a formative influence. The works of Gidel, Rousseau, Vattel, Grotious, Calvo, Hall etc. have left a great imprint on the development of international law.¹³³

3. Application of International Law

Can a citizen invoke International Law (Covenants) in municipal or national (domestic) courts? In simple words, can a citizen of Pakistan go to a local court and sue Government of Pakistan or an employer on the basis that the rights enshrine in the International Covenant on Economics, Social and Cultural Rights, 1976, have been denied to him? This issue is discussed in legal parlance as relationships between International Law and Municipal Law (domestic law of a country).

There are two opposing schools of thoughts in this regard (i) Dualism and (ii) Monism. Dualism believes that International Law would not as such form part of the International Law of a state. In particular instances, rules of International Law may apply within a state by virtue of their adoption or incorporation by the internal law of the state. On the other hand, Monists argue that the internal law of the state. On the other hand, Monists argue that the internal law is derived from the international legal system; so International Law can be regarded as incorporated in the Municipal Law.

The State practice in this regard varies. Some States consider International Law as part of their Municipal Law whereas certain states adopt International Law into Municipal Law by employing various procedures. The States treat Customary International Law and Treaties differently. We would only deal with Treaties as International Law dealing with human rights is codified in International Covenants (Treaties).

In United Kingdom, where a Treaty affects private rights or, generally, requires for the implementation of its obligations, a modification of existing law or the necessary changes in the Law shall be made by the Parliament. In other words, biding international Treaties cannot be invoked directly by individuals as a basis for legal rights or obligations to be asserted before the courts except European Union law, which is, to a great extent, directly applicable. The

¹³² Professor Christopher Greenwood, 'Sources of International Law: An Introduction:
http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf

¹³³ Brownlie, p 1-31 and Harrism, p 23-66

Parliament has to ratify a Treaty (in some jurisdictions) and subsequently amend the domestic legislation, if so required, accordingly.

In Austria, under Article 50 of the Constitution, the Treaties containing provisions modifying or completing existing laws require for their validity by the approval of the Parliament. In Belgium, Article 68 of the Constitution provides that the Treaties of commerce and Treaties, which may impose obligation on the State or on individuals have effect only after assent of the Parliament. Almost same is the position in Germany, France, Greece, Ireland, Italy, and Switzerland. The Netherlands has a different practice under Articles 93 and 94 of the Constitution and the provision of Treaties shall have effect when they are published. In other words, the assent of Parliament is not required.

The Constitution of the United States (Article VI) provides that ‘Treaties made under the Authority of the United States are part of the Supreme Law of the land binding on the Judges in every state, anything to the contrary in state constitutions or laws notwithstanding’. However, there is a distinction drawn by American Courts between ‘self-executing’ and ‘non-self-executing’ Treaties. A self-executing Treaty is one which does not in the view of American Courts expressly or by its nature require legislation to make it operative within the Municipal field, and the nature of the Treaty has to be determined by regard to the intention of the signatory Parties and to the surrounding circumstances. If a Treaty is within the terms of the Constitution, and it is self-executing within the meaning just referred to, then under the Constitution it is deemed to be operative as part of the Law of the United States, and will prevail, also over a customary rules of International Law. On the other hand, Treaties, which are not self-executing, but require legislation, are not binding upon American Courts until the necessary legislation is enacted.

In Pakistan, the Executive has the prerogative to sign and ratify any International Treaty but it needs adoption or incorporation into the domestic law by the Parliament for its enforcement through domestic courts. In other words, we follow the dualist tradition as is the case in United Kingdom.

There are various procedures for the Parliaments to adopt an International Treaty. Normally either Parliament passes an Act adopting words of the Treaty or makes Treaty as a Schedule of an Act.

While applying international law, the primary question domestic courts must address, however, is whether any particular international norm has been transformed from practice to law. It has been argued that ‘legalization’ of an international norm involves three essential attributes, each of which is ‘a matter of degree and gradation’:

- (1) ‘Obligation’—the extent to which the norm is *legally* binding on a state or other actor;
- (2) ‘Precision’—the extent to which the norm unambiguously defines the required, authorized, or proscribed conduct; and
- (3) ‘Delegation’—the extent to which third party institutions (especially domestic courts, independent agencies, and international courts) have authority ‘to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules’.

In broad terms, domestic courts while dealing with international law have tendency to adopt either ‘harmonization techniques’ or ‘avoidance techniques’. The former term covers a wide variety of practices domestic courts employ to give effect to international legal norms in their domestic legal systems. The latter term describes a range of contrasting techniques some

domestic courts have devised to by-pass otherwise (i.e. under their own constitutional arrangements) applicable international legal provisions.¹³⁴

4. Withering state sovereignty

The state sovereignty, a cardinal principle of International Law is incrementally withering away. Sovereignty cannot be defined by a single definition. It may have different meanings in different disciplines. The following list provides different meanings given to the term:

- (1) Sovereignty as a personalized monarch (real or ritualized)
- (2) Sovereignty as absolute, unlimited control or power;
- (3) Sovereignty as political legitimacy;
- (4) Sovereignty as political authority;
- (5) Sovereignty as self-determined, national independence;
- (6) Sovereignty as governance and constitutional order;
- (7) Sovereignty as a criterion of jurisprudential validation of all law (Grundnorm, rule of recognition, sovereign);
- (8) Sovereignty as the juridical personality of sovereign equality;
- (9) Sovereignty as international recognition;
- (10) Sovereignty as a formal unit of a legal system;
- (11) Sovereignty as legal immunities;
- (12) Sovereignty as jurisdictional competence to make and/or apply law; and
- (13) Sovereignty as basic governance competencies (constitutive process).

Sovereignty as a political or legal concept was developed in Europe in the 17th through 19th centuries and it is now vigorously asserted by non-European states that historically operated with the concept of empire rather than of sovereignty. The European nation state system and the doctrine of sovereignty is an outgrowth of the imperial tradition of the Holy Roman Empire and as a reaction to sweeping, religion-oriented claims of imperial hegemony.

The classical political science and traditional international law describes the following four essential characteristics of nation-States:

- (1) Control over a territorial base with determinable boundaries;
- (2) Control over a population connected by solidarity, loyalty, and primary notions of group affiliation and identity;
- (3) Internal governance that requires a controlling internal power and competencies;
- (4) Controlling power to represent the State or territorially organized body politic in the international environment.

Modern nation state is supposed to be fully autonomous and sovereign with full domestic jurisdiction. How it can be subject to the norms of International Human Rights? There are two approaches to the issue. On the one hand, the doctrine of Victoria advocates the binding force of International Law and an organic conception of the International Community of States. On the other hand, the Vattel doctrine emphasizes the independence and political liberty of the states.¹³⁵

Brownlie states that sovereignty and equality of states represent the basic constitutional doctrine of the law of nations. As states are equal and have legal personality, sovereignty is in a major aspect a relation to other states but describes the principal corollary of state sovereignty as

¹³⁴ David Sloss, 'International Law in Domestic Courts' Santa Clara University School of Law: <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1891&context=facpubs>

¹³⁵ 1. Jack Donnelly, '*Universal Human Rights in Theory and Practice*' (1989) at 118

the dependence of obligations arising from customary law and treaties on the consent of the obligor.¹³⁶

International law still venerates sovereignty but it is the people's sovereignty rather than the sovereign's sovereignty. Under the older notions, International human rights were subject to domestic sovereignty but now no serious scholar will support the argument that internal human rights are essentially within the domestic jurisdiction of any state and hence immune from International law. International Law still protects sovereignty but the object of protection is not despots but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.¹³⁷

Article 2(7) of the UN Charter provides:- 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'.

The member states have frequently invoked this Article to argue that the General Assembly is acting beyond its powers by debating certain issues falling within domestic jurisdiction. The General Assembly replies that Article 10 authorizes it to 'discuss any question or any matter within the scope of the present Charter' as well as to 'make recommendations' to member states on such matters and that Article 13 of the Charter authorizes it to initiate studies and make recommendations for the purpose of 'assisting in the realization of human rights and fundamental freedoms. The International Court of Justice has never ruled on this issue but the continuing practice of the political organs of the UN in overriding the claims of domestic jurisdiction may have created new law on the question, at least with respect to its meaning in Article 2(7).

The Charter of the UN allows members both to assert their sovereignty and limit their sovereignty; however, it does not define sovereignty. The first words in the Preamble of the Charter introduce the key terms: 'We the Peoples of the United Nations determined'. The early references to 'Peoples' and 'Nations' when coupled with the term 'determined', suggest that the peoples of the world are the ultimate source of international authority. The demands of the "Peoples" are expressed in four fundamental principles on which the UN is premised:

- (1) Prevention of war;
- (2) Protection of human rights;
- (3) Respect for social progress according to the rule of law; and
- (4) Higher living standards and development for all.

However, the concepts of 'United' and 'Nations' must be understood conjunctively generating conflicts about the nature of sovereignty between sovereign nations and institutional authority. In other words, there is tension in the international constitutional architecture based on principles of international obligations on the one hand and sovereign, territorial, and political independence on the other.

The Preamble and Article 1 of the Charter of UN describes the scope of international obligations and the limitations on state sovereignty. Article 2 gives us a different structure of the division of competence and obligations:

¹³⁶ Ian Brownlie, '*Principles of Public International Law*' 4th ed, 1990, at 287

¹³⁷ W.M. Reisman, '*Sovereignty and Human rights in contemporary International Law*, 84 amer. J. Int. L. 866 (1990) at 869

- (1) Article 2(1) states that the UN is 'based on the principle of sovereign equality of all its Members;
- (2) Article 2 (7) indicates that the UN is not authorized to intervene 'in matters which are essentially within the domestic jurisdiction of any state'.
- (3) Article 2(4) prohibits the threat or use of force to attack the 'territorial integrity or political independence of any state';
- (4) Article 2 also specifies restrictions on State sovereignty that States are subject to a good faith obligation to honour Charter values and are required to settle disputes by peaceful methods.

Nuremberg Trials established the jurisdictional principle that State officials can be tried for criminal offenses under international law based on the principle of universal jurisdiction and tried for territorial and extra-territorial offenses against international law. Then two ad hoc tribunals for trying individuals who committed heinous crimes against international law in the former Yugoslavia and Rwanda were created. International Criminal Court and the Rome Statute entered into force on July 1, 2002.

Spain issued an indictment against Pinochet and asked the United Kingdom to apprehend and extradite him to Spain to stand trial there for violations of international criminal law.' The House of Lords ruled that he was extraditable, and it was only because of a finding of ill health that the Home Secretary chose not to extradite Pinochet. Other States such as Belgium' have already tried a case' and issued arrest warrants for foreign governmental officials on the basis that there is cause to believe that they have committed international crimes sufficient to activate universal jurisdiction. Specifically, Belgium issued arrest warrants against an African Foreign Minister' and the Prime Minister of Israel.'

The International Criminal Tribunal for Rwanda (ICTR) has convicted a Rwandan bourgmestre, mayor of a city, on an indictment based partially upon the crime of genocide; International Criminal Tribunal of former Yugoslavia has convicted Slobodan Milosevic of Serbia for crimes against humanity. The legal basis for these developments is built on the principle of universal jurisdiction. It is obvious that this precept challenges the principle of unlimited sovereignty, or in international constitutional terms, the reach of internal "domestic jurisdiction" under Article 2(7) of the UN Charter.'

The Preamble of the Rome Statute of the International Criminal Court (ICC) affirms that the "most serious crimes are of "concern to the international community and must not go unpunished." The Preamble also indicates that the international community is determined to put an end to impunity. Article 1 of the Rome Statute establishes the International Criminal Court and stipulates that it shall be a "permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern."

Article 27 of ICC makes explicit that the statute applies to high level governmental officials such as the head of State or the head of government, as well as governmental officials or elected politicians.' None are "exempt from criminal responsibility. Article 27(2) makes explicit that immunities or special procedural rules will not shield the court from exercising its jurisdiction.

The standard for the kinds of acts considered international crimes within the jurisdiction of the ICC is wider than the standards articulated by the Nuremberg Tribunal and those of both the ad hoc Tribunals for Rwanda and the Former Yugoslavia. Nuremberg did not include the crime of genocide within its jurisdiction and the ad hoc tribunals' statutes omitted the crime of aggression.

A general feeling is that the universal jurisdiction of such international tribunals itself is incompatible with a system of international law and international relations based on sovereign States but a deeper analysis suggests that sovereignty does not draw from state absolutism but in fact emanates from power of the people and such international crimes are essentially against the people, or against the sovereignty established by the people. In other words, universal jurisdiction of international tribunals is an instrument for the protection of sovereignty, which is based on the human and humanitarian rights of people.

International Covenant on Civil and Political Rights (1976) further clarifies the nature of sovereignty under the UN Charter. Article 16 says that everyone shall have the right to recognition everywhere as a person before the law; Article 18 declares the people's right to freedom of thought; Article 19 stresses the people's right to hold opinions without interference and that the people shall have the freedom of expression; Article 25 highlights the right to participate in the political welfare of the State, the universal right to vote, and the right to have access to public service.

In other words, there is a significant change (brought by the UN Charter and subsequent instruments) that the idea of sovereignty cannot be identified with state absolutism only and is incrementally based on a predicate of authority and legitimacy, which is rooted in the people's expectations.¹³⁸

¹³⁸ Winton P. Nagan, and Craig Hammer, 'The Changing Character of Sovereignty in International Law and International Relations' *Columbia Journal of Transitional Law*, <http://scholarship.law.u.edu/facultypub>

Part II

UNITED NATIONS HUMAN RIGHTS

Chapter Five

UNIVERSAL DECLARATION OF HUMAN RIGHTS

1. Context

The United Nations came into existence in the wake of World War II on October 24, 1945, as an intergovernmental organization, with the main purpose of saving future generations from the devastation of international conflict. The Charter of the United Nations (the Charter) established six principal bodies: (i) the General Assembly; (ii) the Security Council; (iii) the International Court of Justice; (iv) the Economic and Social Council (ECOSOC); (v) the Trusteeship Council; and (vi) the Secretariat.

The UN Charter does not say anything directly about human rights. It contains some promotional provisions such as ‘increasing respect for human rights’, ‘associating in realization of human rights’, ‘promote—universal respect for observance of human rights.’. Furthermore, it radically transforms the laws of war concerning *just ad bellum* (justice and legality of waging of war) whereas the earlier body of law had been discussing exclusively *jus in bello* (the rules regulating the conduct of warfare).

Article 2(4) provides that the UN members shall refrain, in their international relations, from the threat or use of force against the territorial integrity or political independence of any state but this rule shall not impair the inherent right of individual or collective self-defence if an armed attack occurs against a member State.

The Charter empowered the ECOSOC to establish ‘commissions in economic and social fields and for the promotion of human rights’.¹³⁹ In June 1946, the ECOSOC established the Commission on Human Rights, comprising of total 18 members representing various nationalities and political backgrounds. The Commission, a standing body of the UN, was established to undertake the work of preparing an International Bill of Rights. The Commission on Human Rights established a special Universal Declaration of Human Rights Drafting Committee, chaired by Eleanor Roosevelt (former first lady of US), to write the articles of the Declaration.

Some representatives argued that the draft bill of rights under preparation should take the form of a Declaration that would exert a moral and political influence on states rather than constitute a legally binding instrument. Other

¹³⁹ Article 51 of the UN Charter

representatives urged the Commission to prepare a draft Convention containing a bill of rights that would be submitted to the states for their ratification. The first path was followed.

John Humphrey of Canada, Rene Cassin of France, Charles Malik of Lebanon and P. C. Chang of China prepared the initial draft that became the working text for the Commission. When the drafting committee finished its work in May 1948, the draft was further discussed by the Commission on Human Rights, the ECOSOC, and the Third Committee of the General Assembly. The Declaration was adopted by the General Assembly on 10 December 1948. Of the then total 58 members of the United Nations, 48 voted in favour, none against, eight abstained and two failed to vote or abstain.

The Declaration is the most universal human rights document in existence, delineating the thirty fundamental rights that form the basis for a democratic society.¹⁴⁰ Universal Declaration of Human Rights (UDHR), is the foundational document of international human rights law and has rightly been called as Magna Carta of humanity.¹⁴¹ This Declaration became the springboard for the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) in 1966. This 28-year delay was due to the ideological conflicts during the cold war. These Covenants with the UDHR form the international bill of rights.

The Universal Human Rights system consists of several national and regional instruments. The more significant among them are the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Social and Political Rights (ICCPR, 1966) AND THE INTERNATIONAL Covenant on Economic Social and Cultural Rights (ICESCR, 1966). Among the regional instruments the important one are: The European Convention of the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention of Human Rights and African Charter on Human and Peoples Rights.

2. Basic Principles

The Preamble of the Declaration highlights the following principles, which permeate the rights and duties, enshrined in the declaration.

- 1) All the members of the human family have the inherent dignity and equal and inalienable rights.

¹⁴⁰ <https://www.humanrights.com/what-are-human-rights/brief-history/the-united-nations.html>

¹⁴¹ <https://www.britannica.com/topic/Universal-Declaration-of-Human-Rights>

- 2) Recognition of the inherent dignity and of the equal and inalienable rights is the foundation of freedom, justice and peace in the world.
- 3) Disregard and contempt for human rights result in barbarous acts, which outrage the conscience of mankind.
- 4) Freedom of speech and belief and freedom from fear and want is the highest aspiration of the common people.
- 5) Human rights should be protected by the rule of law, if man is not compelled to have recourse to rebellion against tyranny and oppression.

The Preamble also proclaimed this Universal Declaration of Human Rights as a common standard of achievement for all the peoples. It also declared that because the peoples of United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person; therefore:

- (a) Every individual and every organ of society shall strive by teaching and education to promote respect for the rights and freedoms; and
- (b) All should try, by progressive measures, to secure their universal and effective recognition and observance.

When we examine carefully, it appears that the Declaration enshrines the following cardinal principles that constitute the whole paradigm of the human rights:

- 1) **Universality:** Human rights must be afforded to everyone, without exception. The entire premise of the framework is that people are entitled to these rights simply by virtue of being human.
- 2) **Indivisibility:** Human rights are indivisible and interdependent, which means that in order to guarantee civil and political rights, a government must also ensure economic, social and cultural rights (and vice versa). The indivisibility principle recognizes that if a government violates rights such as health, it necessarily affects people's ability to exercise other rights such as the right to life.
- 3) **Participation:** People have a right to participate in how decisions are made regarding protection of their rights. This includes but is not limited to having input on government decisions about rights. To ensure human rights, governments must engage and support the participation of civil society on these issues.
- 4) **Accountability:** Governments must create mechanisms of accountability for the enforcement of rights. It is not enough that rights are recognized in domestic

law or in policy rhetoric, there must actually be effective measures put in place so that the government can be held accountable if those rights standards are not met.

5) **Transparency:** Transparency means that governments must be open about all information and decision-making processes related to rights. People must be able to know and understand how major decisions affecting rights are made and how public institutions, such as hospitals and schools, which are needed to protect rights, are managed and run.

6) **Non-Discrimination:** Human rights must be guaranteed without discrimination of any kind. This includes not only purposeful discrimination, but also protection from policies and practices, which may have a discriminatory effect.¹⁴²

3. Framework

The Declaration consists of a Preamble and thirty Articles.

1) The Preamble sets out the historical and social causes that led to the necessity of drafting the Declaration.

2) Article 1 is declaratory in nature i.e. it declares that all human beings are born free and equal in dignity and rights and that they are endowed with reason and conscience. It also exhorts them to act towards one another in a spirit of brotherhood.

3) Article 2 declares that the rights have to be exercised without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

4) Articles 3–5 established other individual rights, such as the right to life and the prohibition of slavery and torture.

5) Articles 6–11 refer to the fundamental legality of human rights with specific remedies cited for their defence when violated.

6) Articles 12–17 established the rights of the individual towards the community (including such things as freedom of movement).

7) Articles 18–21 sanctioned the so-called "constitutional liberties", and with spiritual, public, and political freedoms, such as freedom of thought, opinion, religion and conscience, word, and peaceful association of the individual.

8) Articles 22–27 sanctioned an individual's economic, social and cultural rights, including healthcare. Article 25 states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family,

¹⁴²<https://www.nesri.org/programs/what-are-the-basic-principles-of-the-human-rights-framework>

including food, clothing, housing and medical care and necessary social services." It also makes additional accommodations for security in case of physical debilitation or disability, and makes special mention of care given to those in motherhood or childhood.

9) Articles 28–30 established the general ways of using these rights, the areas in which these rights of the individual cannot be applied, and that they cannot be overcome against the individual.

4. Limitations

Article 29 imposes on everyone, duties to the community in which the free and full development of his personality is possible. In case of exercise of his rights and freedoms, everyone shall be subject only to such limitations as are:

- (a) Determined by law, solely for the purpose of securing due recognition and respect for the right of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society; and
- (b) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

5. Rights guaranteed

UDHR declares thirty rights and freedoms that are enumerated here as an overview:-

- 1) Right to equality (Article 1)
- 2) Freedom from discrimination (Article 2)
- 3) Right to life and security (Article 3)
- 4) Freedom from slavery (Article 4)
- 5) Freedom from torture (Article 5)
- 6) Right to recognition before law (Article 6)
- 7) Right to equality before law (Article 7)
- 8) Right to an effective remedy (Article 8)
- 9) Freedom from arbitrary arrest (Article 9)
- 10) Right to a fair hearing (Article 10)

- 11) Right to be presumed innocent (Article 11)
- 12) Right to respect for privacy (Article 12)
- 13) Right of freedom of movement (Article 13)
- 14) Right to seek asylum (Article 14)
- 15) Right to nationality (Article 15)
- 16) Right to marry and family (Article 16)
- 17) Right to own property (Article 17)
- 18) Right to freedom of thought (Article 18)
- 19) Right to freedom of expression (Article 19)
- 20) Right to assembly and association (Article 20)
- 21) Right to take part in Government (Article 21)
- 22) Right to social security (Article 22)
- 23) Right to work (Article 23)
- 24) Right to rest and leisure (Article 24)
- 25) Right to a standard of living (Article 25)
- 26) Right to education (Article 26)
- 27) Right to participate in the cultural life (Article 27).
- 28) Right to a social order (Article 28)
- 29) Community duties (Article 29)
- 30) Freedom from interference (Article 30)

1) Right to equality

Article 1 declares that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

These robust sentences start the list of Articles of the Declaration. Writers have tried to trace its roots in many sources, notably the French Declaration of the Rights of Man of 1789 and the American Declaration of the Rights and Duties of Man of 1948. Despite that illustrious parentage, the delegates discussed placing it

in the preamble rather than making it one of the Articles. Similarly, there were disagreements over language, including over the meaning of the word ‘born’, an argument that remains part of today’s debates over abortion. While drafting this Article, the delegates were mindful of the dark human rights abuses during World War II. French delegate Rene Cassin, who was one of the drafters of the Article, explained to the delegates that it was essential to stress the ‘unity of the human race’ because Hitler ‘started by asserting the inequality of men before attacking their liberties’.¹⁴³

Bearing a clear resemblance to the French revolutionary slogan of ‘liberté, égalité, fraternité’. Article 1 provides that all people are born free and equal in dignity and rights and, as a result of common birth into the human family, should treat one another in a spirit of brotherhood. This Article has been referred to as the ‘cornerstone’ of the Universal Declaration. During the drafting process, it occupied more debate and discussion time than any other Article. The words ‘free and equal in dignity and rights’ encapsulate—without theoretical or philosophical exploration—the main foundational concepts of the Declaration and are closely linked to the themes and ideas found in the first recital of the Preamble.¹⁴⁴

2) Freedom from discrimination

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The principle of ‘equality’ is implicit in the concept of human right as belonging to all human beings, and therefore to all equally. Equality in the enjoyment of rights occupies a central place in modern international human rights law, as well as in the constitutional law of many states.

This Article deals with the principles of equality and non-discrimination and states in a negative way what Article 1 states in positive terms. Articles 2 and 7 (which concern ‘equal protection before the law’) are thus the two textual anchors for the non-discrimination theme that runs throughout the document. The list of

¹⁴³ https://www.ica.org/sites/default/files/HRWG_2010-01-Newsletter_ENG.pdf

¹⁴⁴ http://ccnmtl.columbia.edu/projects/mmt/udhr/article_1.html

items in this Article is crucial for the protection of members of groups whose minority status is defined by one of the terms on the list.¹⁴⁵

3) Right to life

Everyone has the right to life, liberty and security of person. The right is non-derogable. This seems straightforward-governments and individuals are enjoined to refrain from the wanton killing of their subjects and fellow beings but in fact aside from that aspect, it is in fact hard to determine what a right to determine what these rights encompass. However, this Article suggests:

- (a) The public authorities, groups or individuals should refrain from acts and omissions which directly endanger life, liberty and security of a person; and
- (b) There is a positive obligation on the part of the states, groups and individuals to take reasonable steps in order to prevent the deprivation of life, liberty and security of persons.

This right has been enshrined in Article 6 of the ICCPR that says: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court’.

This Article does not create exceptions. However, the corresponding Article 2 of the European Convention of Human Rights (hereinafter called ECHR) enumerates these exceptions, which are aimed mainly at the unintentional deprivation of life:

- (a) Life can be deprived by a well-defined due process of law; and
- (b) Life can be deprived when it results from the use of force which is not more than absolutely necessary:
 - (i) In defence of any person from unlawful violence;
 - (ii) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

¹⁴⁵ http://ccnmtl.columbia.edu/projects/mmt/udhr/article_2.html

- (iii) In action lawfully taken from the purpose of quelling a riot or insurrection.

Article 5 of the ECHR explains exceptions in respect of the right to liberty. We must keep them in mind while exercising this right. According to this no one shall be deprived of his liberty unless in the following cases:

- (a) The lawful detention after conviction by a competent court;
- (b) The lawful arrest or detention with the lawful order of a court;
- (c) The lawful arrest or detention to bring the person before a court on reasonable suspicion of having committed an offence; and
- (d) The lawful detention for preventing the spread of infectious disease, of persons of unsound mind, addicts etc.

4) Freedom from slavery

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Slavery is antithesis of liberty and is the worst form of human degradation. The most naked form of slavery, servitude or slave trade cannot be found now but still it is practiced in various forms in many parts of the world.¹⁴⁶

Article 8 of the ICCPR says that no one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude.

5) Freedom from torture

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 3 of the ECHR and Article 7 of the International Covenant on Civil and Political Rights (hereinafter called ICCPR) also deal with the same issue. Article 7 of the ICCPR says that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

This right is non-derogable and contains no exceptions. These four forms of treatment represent different levels of seriousness. The aim of the Article is to protect both the dignity and the integrity, physical and mental, of the individual. Now a special regime called convention against the Torture and Other Cruel,

¹⁴⁶Keeping in view the importance and invisibility of the issue, a special chapter, 'Beyond Chain' has been devoted to the issue.

Inhuman or Degrading Treatment or Punishment entered into force on 26 June 1987.

6) Recognition before law

According to Article 6, every normal adult man or woman has the right to be recognized before the law. Minors also have this right to recognition. However, in certain cases they cannot represent themselves rather they can be represented by their guardians or next friends, who can claim and receive what is due to them and can give what is due from them.¹⁴⁷

This Article gives an equal protection to women as an equally competent legal person with the full capacity before civil as well as criminal law. In nutshell it means that every person, man or woman is *sui generis*. However, Legislature can enact qualifications and protections for incapacitated persons i.e., mentally retarded, minors, unconscious, infirm, etc.

Article 16 of the ICCPR reads: Everyone shall have the right to recognition everywhere as a person before the law.

7) Equality before law

According to Article 7, all persons are equal before the law and are entitled, without any discrimination, to equal protection of the law. All are entitled to equal protection against any discrimination and violation of this Declaration and against any incitement to such discrimination.¹⁴⁸

There is a subtle distinction between equality before law and equal protection of law. The former means that every citizen, whether man or woman, rich or poor, educated or illiterate, stands on an equal footing before the law, while the latter means that no citizen can be put beyond the pale of law and no bill of outlawry can be passed against him. Thus, equality before law can have no content other than the one, which is compatible with the due maintenance of the guarantee of equal protection of law.¹⁴⁹

The rule of equality before the law was enunciated by Dicey as part of his thesis on the rule of law. By asserting equality under the rule of law, what he meant to convey was that all citizens were equally subject to the ordinary law of the land, administered by the ordinary courts and that the rule of law in this sense

¹⁴⁷ Article 6 of ICCPR

¹⁴⁸ Article 7 of the ICCPR

¹⁴⁹ Brohi, A.K, 'The Fundamental Laws of Pakistan', Din Muhammad Press, Karachi, 1958 at 34

excluded the idea of any exception of official or others from the duty of obedience to the law which governed the other citizens or from the jurisdiction of the ordinary tribunals.¹⁵⁰

It is generally accepted that the Doctrine of 'equal protection of law' permits classification, which in turn must be reasonable and be based on a defined criterion.¹⁵¹

This right is codified in Article 26 of the ICCPR. It reads that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

8) Effective remedy

Everyone has the right to an effective remedy by the competent national tribunal for acts violating rights guaranteed by the Constitution or by the law. The remedial machinery may include courts, tribunals or any other possible forum. Remedy ought to be present even if persons acting in an official capacity have committed the violation.¹⁵² The remedy is required if the substantive rights or freedoms granted by the Constitution or by the law are in question.

Article 8, says that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. The Article does not and cannot connote a requirement that there should be domestic machinery in place to address any possible grievance.

Article 2 of the ICCPR recognizes this right by declaring that each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the

¹⁵⁰ Dicey, *'An Introduction to the Law of constitution'*, Macmillan & co, London, 10th ed, 1959, at 183

¹⁵¹ Lord Rottschaefer, *'Constitutional Law'*, quoted by Brohi (opp. Cited) at 353

¹⁵² Article 13 of the ECHR

legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

9) Freedom from arbitrary arrest

No one shall be subject to arbitrary arrest, detention or exile.¹⁵³ This exhortation was given a legal cover by Article 9 of the ICCPR, which also explains other incidental rights. It says that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Any one arrested or detained on a criminal charge shall be brought promptly before a judge and shall be entitled to trial within a reasonable time or to release. Furthermore, anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation.

10) Fair and public trial

The Article 10 entitles in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and any criminal charge against him. The Article provides protection of a fair trial in both civil and criminal matters.

The right was provided legal foundation and consequential details by Article 14 of the ICCPR which also says that the press and public may be excluded from all or part of trial for reasons of morals, public orders or national security or when the interest of the private lives of the parties so require.

In criminal cases, everyone/accused has right:

To be informed promptly and in detail in a language which he understands, of the nature and cause of the charge against him;

- (a) To have adequate time and facilities for the presentation of his defence by the counsel of his own choosing;
- (b) To have trial without undue delay;
- (c) To be tried in his presence;

¹⁵³ Article 9 of the UDHR

- (d) To be allowed to defend himself in person or through legal assistance of his own choosing ;
- (e) To examine or to have examined the witnesses against him;
- (f) To obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (g) To have a free interpreter if he cannot understand or speak the language used in the court;
- (h) Not to be compelled to testify against himself or to confess guilt;
- (i) To an appeal to a higher tribunal.

11) Innocence and Retroactivity

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. No one shall be held guilty of any offence on account of any act or omission, which did not constitute a penal offence at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.¹⁵⁴

The presumption of innocence is fundamental to the protection of human rights. By reason of this presumption, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. It is also a duty of all public authorities to refrain from prejudging the outcome of the trial.

The principle governing the powers of a Legislature is that it can make all laws, including retrospective laws operating in the field of substantive laws and procedure. There is no fundamental difference between *ex post facto* and retrospective laws, except that the former is wider and also includes procedural legislation e.g. it can render a previous act criminal or increase the punishment for a crime retrospectively. The Article 11 of the Declaration prohibits *ex post facto* and retrospective laws and this principle has been codified under Article 14 of the ICCPR.

12) Respect for privacy

¹⁵⁴ Article 14 of the ICCPR

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attack.¹⁵⁵

Same protection is accorded in Article 17 of the ICCPR that says no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation and everyone has the right to the protection of law against such interference or attacks.

Article 8 of the ECHR says that the interference by a public authority with the exercise of the right can be only:

- (a) in accordance with the law; and
- (b) when it is necessary in a democratic society in the interests of:
 - (i) national security, public safety; or
 - (ii) the economic well-being of the country;
 - (iii) for the protection of disorder or crime;
 - (iv) for protection of health or morals; or
 - (v) for the protection of the rights and freedoms of others.

An important aspect of privacy is that of control over personal information and there should be a procedure to weigh it up against a competing interest. Effective measures have to be taken by states to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive it.¹⁵⁶

13) Freedom of movement

Everyone has the right to freedom of movement and residence within the borders of each state. It means that everyone can move freely from one area to the other and can also change residence from one part of the country to the other. It is true with respect to the right to leave any country including his own and to return to his country.¹⁵⁷

However, Article 12 of the ICCPR enumerates certain restrictions that can be imposed on the exercise of this right:

¹⁵⁵ Article 12 of UDHR

¹⁵⁶ Article 8 of the ECHR and Article 17 of the ICCPR

¹⁵⁷ Article 13 of the UDHR

- (a) these ought to be provided by law; and
- (b) are necessary to protect,-
 - (i) national security,
 - (ii) public order,
 - (iii) public health or morals or
 - (iv) the rights and freedoms of others; and
 - (v) should be consistent with the other rights recognized in the ICCPR.¹⁵⁸

14) Right of asylum

Under Article 14, everyone has the right to seek and enjoy in other countries asylum from persecution. However, this right may not be invoked in the cases of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

15) Right of nationality

Everyone has the right to a nationality and no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.¹⁵⁹

This right is meant to save persons from homelessness or statelessness. The right connotes three things that:

- (a) everyone has a right to a nationality. The Article has not clarified the question of ‘nationality of which country? It will depend on the principle of ‘effective and genuine link’ i.e., a person will have a right to get the nationality of the country with which he/she has effective and genuine link/connection.
- (b) A person can be deprived of his nationality only with due process of law and that too in accordance with the constitution or law, and
- (c) Everyone is free to change his nationality if so desires and deserves in accordance with the established norms of law of the land or international law.

¹⁵⁸ Article 2 and 3 of Protocol No. 4 of the ECHR

¹⁵⁹ Article 15 of the UDHR

16) Marriage and family

Men and women of full age have the right to marry and to found a family. They can exercise this fundamental right without any limitation due to race, nationality or religion.¹⁶⁰ They are entitled to equal rights as to marriage and during marriage and at its dissolution. Furthermore, marriage shall be entered into with free and full consent of the intending spouses. These rights are based on the belief that the family is the natural and fundamental group unit of the society and is entitled to protection by the society and the state.

Article 23 of ICCPR says that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. The right of men and women of marriageable age to marry and to found a family shall be recognized. No marriage shall be entered into without the free and full consent of the intending spouses. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. Under Article 12 of ECHR, this right will be exercised in accordance with national law.¹⁶¹

The right to family implies the possibility to procreate and live together; hence family planning should be consistent with this right. During the marriage, equality extends to all matters arising from their relationship. This right also implies that states can establish a specific marriageable age to enable each of them to free and full consent.

17) Right of property

Article 17 declares that everyone has the right to own property, alone as well in association with others and no one shall be arbitrarily deprived of his property. This right is codified in Article 1 of the Protocol No.1 of the ECHR. This right includes three things:

- (a) every person (man, woman, minor) has right to own property as his legally vested right. Right to own includes right to acquire, hold and dispose;
- (b) this right can be exercised alone or jointly with others; and
- (c) deprivation of the property can only take place in accordance with the laws.

¹⁶⁰ Article 16 of the UDHR

¹⁶¹ Article 12 of the ICCPR

The term property includes interest in property, like that of a mortgage, lease, patents, copyrights and every other 'thing' of exchangeable value. The right to acquire, hold and dispose property can be subject to reasonable and justifiable restriction in the public interest.

18) Freedom of thought

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to:

- (a) change his religion or belief; and
- (b) manifest his religion, in public or private, in teaching, practice, worship and observance.¹⁶²

The ICCPR added further dimensions to the exercise of this right:

- (a) there should be no coercion which would impart the freedom of the person to have or to adopt a religion or belief of his choice; and
- (b) the state shall undertake that the parents and legal guardians will have the right to ensure the religious, moral education of their children in conformity with their own convictions.¹⁶³

Article 9(2) of the ECHR explains limitations on the exercise of this right. The limitations are valid only if:

- (a) prescribed by law and
- (b) are necessary in a democratic society in the interest of:
- (c) public safety;
- (d) protection of public order;
- (e) protection of health or morals; or
- (f) protection of the rights and freedoms of others.

19) Freedom of expression

Everyone has the right to freedom of opinion and expression. The right includes to:

- (a) hold opinion without interference; and

¹⁶² Article 18 of the UDHR

¹⁶³ Article 18 of the ICCPR

- (b) seek, receive and impart information and ideas through any media, regardless of frontiers.¹⁶⁴

Article 18 of ICCPR upholds this right by codifying that everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The ECHR makes it clear that this right can be subject to such conditions, formalities, restrictions or penalties as are:

- (a) prescribed by law; and
- (b) necessary in a democratic society in the interest of
 - (i) national security;
 - (ii) territorial integrity;
 - (iii) public safety; and
 - (iv) for the prevention of disorder and crime;
 - (v) the disclosure of information received in confidence;
 - (vi) and for the protection of health or morals;
 - (vii) for the protection of reputation or rights of others; and
 - (viii) for maintaining the authority and impartiality of judiciary.¹⁶⁵

However, the ICCPR reduces the limitations to the following:

- (a) for respect of the rights and reputation of others; and

¹⁶⁴ Article 18 of the UDHR

¹⁶⁵ Article 10 of the ECHR

for the protection of national security or public order, public health or morals.¹⁶⁶

20) Freedom of assembly

Everyone has the right to freedom of peaceful assembly and association but no one may be compelled to belong to an association.¹⁶⁷ The ECHR extends this right to form and to join trade union for the protection of his interests.¹⁶⁸

Article 11 of the ECHR and Article 22 of the ICCPR describes the limitations that can be imposed on the exercise of this right by saying that:

- (a) only those restrictions can be imposed which are prescribed by law; and
- (b) which are necessary in a democratic society in the interest of:
 - (i) national security;
 - (ii) public safety;
 - (iii) public order;
 - (iv) protection of public health or morals; or
 - (v) protection of rights and freedoms of others.

The addition of word ‘peaceful’ has restricted the scope of assembly. ‘Association’ need not be assigned notional meaning. It means voluntary association, not a professional organization established by the government. However, the freedom of association also implies protection against compulsory membership of an association.

21) Public rights

Everyone has the right to take part in the government of his country. This right can be exercised directly or through chosen representatives. Furthermore, everyone has the right to equal access to public service in his country. The authority of the government should be based on the will of the people and this should be expressed by:

- (a) free and genuine elections;

¹⁶⁶ Article 19 of the ICCPR

¹⁶⁷ Article 20 of the UDHR

¹⁶⁸ Article 20 of the ECHR

- (b) the election shall be conducted on universal and equal suffrage; and
- (c) the elections shall be held by secret ballot.¹⁶⁹

The ICCPR has codified this right and that it should be exercised:

- (a) without distinction of any kind, such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status; and
- (b) reasonable restrictions can be imposed on this right.¹⁷⁰

22) Social security

Everyone has the right to social security and is entitled to realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. However, this right is subject to the organization and resources of each state.¹⁷¹

Article 9 of International Covenant on Economic, Social and Cultural Rights says that the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

23) Work and employment

Everyone has the right to work and employment. The right to work and employment means:

free choice of employment;

- (a) just and favourable conditions of work;
- (b) protection against unemployment;
- (c) equal pay for equal work;
- (d) just and favourable remuneration that can ensure for himself and his family an existence worthy of human dignity;
- (e) remuneration shall be supplemented, if necessary, by the means of social protection; and

¹⁶⁹Article 21 of the UDHR

¹⁷⁰Article 25 of the ICCPR

¹⁷¹Article 22 of the UDHR

- (f) the right to form and to join Trade Union for the protection of his interests.¹⁷²

The Articles 6 and 7 of ICESCR fortify this right.

24) Rest and leisure

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.¹⁷³ The right to rest and leisure has been considered as a basic right because it is necessary for the social and cultural actualization of his personality.

Article 7 of ICESCR guarantees that the States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, including others, rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

25) Standard of living

Everyone has the right to:

- (a) a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services;
- (b) security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control; and
- (c) motherhood and childhood are also entitled to special care.¹⁷⁴

The right to a standard of living is accepted to preserve and promote the inherent dignity and worth of the human beings otherwise it would be very difficult for the weak and the infirm to survive or to make both ends meet.¹⁷⁵

Article 11 of ICESCR also fortifies this right by saying that the States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

¹⁷²Article 23 of the UDHR; Article 7 of the ICCPR

¹⁷³Article 24 of the UDHR

¹⁷⁴Article 25 of the UDHR

¹⁷⁵Article 11 of the ICESCR

26) Right to education

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made equally accessible and the higher education shall be equally accessible to all on the basis of merit. Parents have the right to choose the kind of education that shall be given to their children. Education shall be directed to the following objectives:

- (a) the full development of the human personality;
- (b) strengthening of respect for human rights and fundamental freedoms;
- (c) promoting understanding, tolerance and friendship among all nations, racial or religious groups; and
- (d) furthering the activities of the United Nations for the maintenance of peace.¹⁷⁶

Article 13 of the ICESCR further elaborated this right by declaring that the States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education; and
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

¹⁷⁶ Article 26 of the UDHR

27) Right to cultural life

Everyone has the right freely to participate in the cultural life of the country, to enjoy the arts and to share in scientific advancements and its benefits. Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or, artistic production of which he is the author.¹⁷⁷

Article 15 of ICESCR declares that the States Parties to the present Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications; and
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

28) Social order

Everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised.¹⁷⁸ This right, though still in ambiguous terms, was accepted under the influence of lobbying by the third world and socialist countries.¹⁷⁹

This is further strengthened by Article 23 of ICESCR which declares that the States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

29) Community duties

Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights

¹⁷⁷ Article 27 of UDHR; Article 15 of the ICESCR

¹⁷⁸ Article 28 the UDHR

¹⁷⁹ For further details see Chapter, 'Right to Development'

and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

It reminds us that the individual has not only rights but duties also. It means that the corollary of rights is duties; otherwise, there can be no balance and harmony in society.

30) Freedom from interference

No one, institution nor individual, should act in any way to destroy the rights enshrined in the UDHR. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein. It also means that none can violate any Article of UDHR by using another Article to justify such action or through any other means.

Chapter Six

ELIMINATION OF RACIAL DISCRIMINATION

1. Introduction

In December 1960, following incidents of anti-Semitism in several parts of the world, the United Nations General Assembly adopted a resolution condemning 'all manifestations and practices of racial, religious and national hatred' as violations of the United Nations Charter and Universal Declaration of Human Rights and calling on the governments of all states to 'take all necessary measures to prevent all manifestations of racial, religious and national hatred'.¹⁸⁰

The Economic and Social Council followed this resolution by drafting a resolution on manifestations of racial prejudice and national and religious intolerance, calling on governments to educate the public against intolerance and rescind discriminatory laws¹⁸¹ and the General Assembly passed it in 1962.

During the early debate on this resolution, African nations pushed for more concrete action on the issue in the form of an international convention against racial discrimination. Some nations preferred a declaration rather than a binding convention, while others wanted to deal with racial and religious intolerance in a single instrument.¹⁸² The eventual compromise, forced by the Arab nations' political opposition to treating religious intolerance at the same time as racial intolerance plus other nations' opinion that religious intolerance was less urgent, was for two resolutions, one calling for a declaration and draft convention aimed at eliminating racial discrimination,¹⁸³ the other doing the same for religious intolerance.¹⁸⁴

The draft Declaration on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly on 20th November 1963. The same day the General Assembly called for the Economic and Social Council and the Commission on Human Rights to make the drafting of a convention on the

¹⁸⁰ United Nations General Assembly Resolution 1510 (XV), 12 December 1960

¹⁸¹ United Nations General Assembly Resolution 1779 (XVII), 7 December 1962

¹⁸² Schwelb, Egon (1966), "The International Convention on the Elimination of All Forms of Racial Discrimination". *International & Comparative Law Quarterly*. **15**: 996–1068

¹⁸³ United Nations General Assembly Resolution 1780 (XVII), 7 December 1962

¹⁸⁴ United Nations General Assembly Resolution 1781 (XVII), 7 December 1962

subject an absolute priority. The draft was finally adopted on 21st December 1965.¹⁸⁵

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires from its members to the elimination of racial discrimination and the promotion of understanding among all races. The Convention also requires its parties to outlaw hate speech and criminalize membership in racist organizations.

The Convention also includes an individual complaints mechanism, effectively making it enforceable against its parties. This has led to the development of a limited jurisprudence on the interpretation and implementation of the Convention. The convention assumes a broad definition of racial discrimination as «any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. Rights and Prohibitions

(1) Prohibition of racial discrimination

Article 2 of the ICERD condemns racial discrimination and obliges parties to ‘undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms; it also obliges parties to promote understanding among all races. To achieve this, the Convention requires that each State Party:

- (a) Undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
- (b) Undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
- (c) Each State party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any law and

¹⁸⁵ United Nations General Assembly Resolution 2106 (XX), 21 December 1965

regulation, which have the effect of creating or perpetuating racial discrimination wherever it exists;

- (d) Shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization; and
- (e) Undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything, which tends to strengthen racial division.¹⁸⁶

This right is also enshrined in Article 5 of the UDHR, Article 7 of the ICCPR, Article 2 and 10 of the ICESCR, Article 37 of the CRC, Article 15 of the CRPD and Article 1 of the CAT.

(2) Condemnation of apartheid

Article 3 condemns apartheid and racial segregation and obliges parties to ‘prevent, prohibit and eradicate’ these practices in territories under their jurisdiction.¹⁸⁷ This Article has since been strengthened by the recognition of apartheid as a crime against humanity in the Rome Statute of the International Criminal Court (effective from 2002).

(3) Prohibition of incitement

Article 4 of the Convention condemns propaganda and organizations that attempt to justify discrimination or are based on the idea of racial superiority.¹⁸⁸ It obliges States Parties, with due regard to the principles embodied in the Universal Declaration of Human Rights, ‘to adopt immediate and positive measures’ to eradicate these forms of incitement and discrimination. Specifically, it obliges parties to criminalize hate speech, hate crimes and the financing of racist activities, and to prohibit and criminalize membership in organizations that promote and incite racial discrimination. A number of parties have reservations on this Article, and interpret it as not permitting or requiring measures that infringe on the freedoms of speech, association or assembly.

The Committee on the Elimination of Racial Discrimination (the Committee) regards this Article as a mandatory obligation of parties to the Convention, and has repeatedly criticized parties for failing to abide by it. It regards the obligation as consistent with the freedoms of opinion and expression

¹⁸⁶ Article 2 of ICERD

¹⁸⁷ Article 3 of ICERD

¹⁸⁸ ¹⁸⁸ Article 4 of ICERD

affirmed in the UNDHR and ICCPR and notes that the latter specifically outlaws inciting racial discrimination, hatred and violence. It views the provisions as necessary to prevent organised racial violence and the political exploitation of ethnic difference.

The prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression, the right embodied in Article 19 of the Universal Declaration of Human Rights.

(4) States to protect rights

The Convention provides that the States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - i. The right to freedom of movement and residence within the border of the State;
 - ii. The right to leave any country, including one's own, and to return to one's country;
 - iii. The right to nationality;
 - iv. The right to marriage and choice of spouse;
 - v. The right to own property alone as well as in association with others;
 - vi. The right to inherit;
 - vii. The right to freedom of thought, conscience and religion;
 - viii. The right to freedom of opinion and expression; and
 - ix. The right to freedom of peaceful assembly and association.

(e) Economic, social and cultural rights, in particular:

- i. The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
- ii. The right to form and join trade unions;
- iii. The right to housing;
- iv. The right to public health, medical care, social security and social services;
- v. The right to education and training;
- vi. The right to equal participation in cultural activities; and
- vii. The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.¹⁸⁹

(5) Judicial Remedies

Article 6 of the Convention requires that States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate the human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination¹⁹⁰

The similar right to have equal protection of law for everyone is also protected by Article 7 of the UDHR, Article 14 of the ICCPR, Articles 12, 37 and 40 of the CRC and Articles 16, 18 and 83 of the CRMW.

(6) Promotion of tolerance

Article 7 of the Convention requires that States Parties shall adopt ‘immediate and effective measures’, particularly in education, to combat racial

¹⁸⁹ Article 5 of ICERD

¹⁹⁰ Article 6 of ICERD

prejudice and encourage understanding and tolerance between different racial, ethnic and national groups.¹⁹¹

3. Enforcement of the Convention

(1) Dispute resolution

The Convention establishes a dispute resolution mechanism between the States Parties.¹⁹² Where a State Party believes that another State Party is not implementing the Convention, such State may complain to the Committee on the Elimination of Racial Discrimination. The Committee will pass on the complaint, and if it is not resolved between the two Parties, may establish an ad hoc Conciliation Commission to investigate and make recommendations on the matter. This procedure has been first invoked in 2018, by Palestine against Israel.¹⁹³

Article 22 of the Convention further allows any dispute over the interpretation or application of the Convention to be referred to the International Court of Justice. This clause has been invoked three times, by Georgia against Russia¹⁹⁴, by Ukraine against Russia¹⁹⁵, and by Qatar against UAE¹⁹⁶.

(2) Individual complaints

Article 14 of the Convention establishes an individual complaints mechanism similar to that of the First Optional Protocol to the International Covenant on Civil and Political Rights, Optional Protocol to the Convention on the Rights of Persons with Disabilities and Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

Parties may at any time, submit complaints to the Committee on the Elimination of Racial Discrimination to consider complaints from individuals or groups who claim their rights under the Convention have been violated.¹⁹⁷ Such

¹⁹¹ Article 7 of ICERD

¹⁹² Articles 11 to 13 of ICERD

¹⁹³ Palestine's Inter-State Complaint under ICERD.

¹⁹⁴ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)'. International Court of Justice

¹⁹⁵ Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)

¹⁹⁶ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)

¹⁹⁷ Article 14 (1) of ICERD

parties may establish local bodies to hear complaints. Complainants must have exhausted all domestic remedies, and anonymous complaints and complaints that refer to events that occurred before the country concerned joined the Optional Protocol are not permitted.

The Committee can request information from and make recommendations to a party. The individual complaints mechanism came into operation in 1982.

(3) Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination is a body of human rights experts tasked with monitoring the implementation of the Convention. It consists of 18 independent human rights experts, elected for four-year terms, with half the members elected every two years. Members are elected by secret ballot of the parties, with each party allowed to nominate one of its nationals to the Committee.¹⁹⁸

All parties are required to submit regular reports to the Committee outlining the legislative, judicial, policy and other measures they have taken to give effect to the Convention. The first report is due within a year of the Convention entering into effect for that state; thereafter reports are due every two years or whenever the Committee requests.¹⁹⁹ The Committee examines each report and addresses its concerns and recommendations to the state party in the form of ‘Concluding Observations’.

The Committee receives copies of the petitions from, and submits opinion and recommendations on these petitions to the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies.

The Committee also receives from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in

¹⁹⁸ Article 8 of ICERD

¹⁹⁹ Article 9 of ICERD

subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

The Committee submits periodic reports to the General Assembly and in its reports; it includes a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.²⁰⁰ The Committee typically meets every March and August in Geneva.

²⁰⁰ Article 15 of ICERD

Chapter Seven

CIVIL AND POLITICAL RIGHTS

1. Introduction

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations through General Assembly Resolution 2200A (XXI) on 16 December 1966, and it is in force from 23 March 1976, in accordance with Article 49 of the covenant. As of August 2017, the Covenant has 172 parties and six more signatories without ratification. International Covenant on Civil and Political Rights (ICCPR), along with International Covenant on Economic, Social and Cultural Rights (ICESCR) constitutes the bedrock of modern International human rights and international bill of human rights.

The ICCPR has its roots in the same process that led to the UDHR. During the drafting of the convention, there remained significant differences between UN members on the relative importance of negative civil and political versus positive economic, social and cultural rights. These eventually caused the Convention to be split into two separate covenants, one to contain civil and political rights and the other to contain economic, social and cultural rights. The first document became the International Covenant on Civil and Political Rights and the second the International Covenant on Economic, Social and Cultural Rights. The drafts were presented to the UN General Assembly for discussion in 1954, and adopted in 1966. As a result of diplomatic negotiations the International Covenant on Economic, Social and Cultural Rights was adopted shortly before the International Covenant on Civil and Political Rights. Together, the UDHR and the two Covenants are considered to be the foundational human rights texts in the contemporary international system of human rights.²⁰¹

2. Basic principles

The Preamble of ICCPR enunciates the following principles, which permeate the Convention:

- (a) There is an inherent dignity of human persons and all rights enshrined in the Convention spring from this fountain;
- (b) Freedom from fear and want is the ideal for which human beings should strive;

²⁰¹ Christopher N.J. Roberts, 'William H. Fitzpatrick's Editorials on Human Rights (1949) , Quellen zur Geschichte der Menschenrechte

- (c) The ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights;
- (d) Every individual has duties to other individuals and to the community to which he belongs; and
- (e) Every individual is under responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

3. UDHR and ICCPR

- 1) The UDHR as a declaration by the General Assembly is aspirational and recommendatory rather than binding under international law. The Covenant, on the other hand, binds the state parties in accordance with its terms subject to reservations.
- 2) The UDHR does not create an international institution whereas the Covenant creates an ongoing institution: the human rights committee²⁰² which gives institutional support to the Covenant norms.
- 3) The UDHR and ICCPR make justificatory statements, in their preambles, founded in moral and political thought.
- 4) The provisions of the UDHR are in greater detail than the provisions of ICCPR.
- 5) Collective rights are hinted at or asserted in the Covenant²⁰³ whereas they are absent from the Declaration.
- 6) The idea of rights dominates in both the instruments. Article 29(1) of the Declaration does provide that everyone has duty in the community in which alone the free and full development of his personality is possible but the Covenant has no Article referring to individual duties.
- 7) Article 17 of the Declaration ‘on the right to own property’ and protection against arbitrary deprivation does not have parallel provision in the Covenant. The ICCPR goes beyond the Declaration by requiring the state to provide remedial system in the event of violation of rights.²⁰⁴
- 8) The Covenant rights are not restricted to rights against governmental interference. The state is duty-bound to provide effective remedies against the interference by non-governmental or private actors as well.
- 9) Article 5 of the Declaration bans ‘cruel, inhuman or degrading’ punishment but does not prohibit capital punishment whereas Article 1 of the Second Optional Protocol to the ICCPR Aiming at the Abolition of the

²⁰² The ICCPR Committee

²⁰³ Articles 1 and 27 of the ICCPR

²⁰⁴ Article 2 of ICCPR

Death Penalty provides that ‘no one within the jurisdiction of a State Party to the present Protocol shall be executed’. ‘Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction’.

4. Overview of ICCPR

The Covenant follows the structure of the UDHR and ICESCR, with a preamble and fifty-three articles, divided into six parts.

- 1) **Part 1** (Article 1) recognizes the rights of all peoples to self-determination including the right to freely determine their political status, pursue their economic, social and cultural goals, and manage and dispose of their own resources. It recognises a negative right of a people not to be deprived of its means of subsistence, and imposes an obligation on those parties still responsible for non-self-governing and trust territories (colonies) to encourage and respect their self-determination;
- 2) **Part 2** (Articles 2-5) obliges parties to legislate where necessary to give effect to the rights recognised in the Covenant, and to provide an effective legal remedy for any violation of those rights. It also requires the rights be recognised without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and to ensure that they are enjoyed equally by women. The rights can only be limited in time of public emergency which threatens the life of the nation;
- 3) **Part 3** (Articles 6-27) lists the rights themselves;
- 4) **Part 4** (Articles 28-45) governs the establishment and operation of the Human Rights Committee and the reporting and monitoring of the Covenant. It also allows parties to recognise the competence of the Committee to resolve disputes between parties on the implementation of the Covenant (Articles 41 and 42);
- 5) **Part 5** (Articles 46-47) clarifies that the Covenant shall not be interpreted as interfering with the operation of the United Nations or the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources; and
- 6) **Part 6** (Articles 48-53) governs ratification, entry into force, and amendment of the Covenant.

The Covenant describes/declares the following rights:

- 1) Right of self-determination (Article 1);
- 2) No discrimination in rights and effective remedy in violation (Article 2);

- 3) Equality of men and women (Article 3);
- 4) Right to life (Article 6);
- 5) Freedom from torture and degradation (Article 7);
- 6) Freedom from slavery and servitude (Article 8);
- 7) Right to liberty and security of person (Article 9);
- 8) Humane treatment of detainees (Article 10);
- 9) No imprisonment in cases of contractual obligations (Article 11);
- 10) Freedom of movement and residence (Article 12);
- 11) Rights of aliens (Article 13);
- 12) Equality before law and other procedural safeguards (Article 14);
- 13) Protection from retroactivity of laws (Article 15);
- 14) Right to recognition before law (Article 16);
- 15) Freedom from interference with his privacy, home (Article 17);
- 16) Freedom of thought, conscience and religion (Article 18);
- 17) Freedom of opinion and expression (Article 19);
- 18) Propaganda of war and hatred prohibited (Article 20);
- 19) Right to peaceful assembly (Article 21);
- 20) Freedom of association (Article 22);
- 21) Protection of family rights (Article 23);
- 22) Rights of children (Article 24);
- 23) Right to public affairs (Article 25);
- 24) Equality before law (Article 26); and
- 25) Rights of minorities (Article 27).

7) First Optional Protocol

This Optional Protocol deals with establishing mechanism for individual complaints related to the ICCPR. States Parties agree to recognise the competence of the UN Human Rights Committee to consider complaints from individuals who claim their rights under the Covenant have been violated. Complainants must have exhausted all domestic remedies, and anonymous complaints are not permitted. The Committee must bring complaints to the attention of the relevant party, which must respond within six months.

8) Second Optional Protocol

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty is a side agreement to the International Covenant on Civil and Political Rights. It was approved by the General assembly on 15 December 1989 and entered into force on 11 July 1991.

As of September 2018, the Optional Protocol has 86 States Parties. In addition, Angola has signed, but not ratified the Protocol.

The Second Optional Protocol commits its members to the abolition of the death penalty within their borders, though Article 2.1 allows parties to make a reservation allowing execution in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

The Protocol is on the belief that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights and that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life. The basic provisions of the Protocol declare as under:

- (a) No one within the jurisdiction of a State Party to the present Protocol shall be executed and each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction (Article 1).
- (b) No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime (Article 2).
- (c) With respect to the States Parties to the Covenant that have made a declaration about the competence of the Human Rights Committee to receive and consider communications, shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession (Article 4).
- (d) There is the competence of the Human Rights Committee to receive and consider communications from individuals unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession (Article 5).
- (e) The provisions of the present Protocol shall apply as additional provisions to the Covenant and the Protocol shall not be subject to any derogation under Article 4 of the Covenant (Article 6).

4. Rights guaranteed

1) Self determination

Article 1 examines one of the most influential, debated and contested provisions of this Covenant, the right of ‘peoples’ to ‘self-determination’, which was of the utmost importance in the era of colonialization. A central question is the degree to which Article 1 addresses the issue of so-called ‘external’ self-determination, the right of a ‘people to independent statehood, as in the process of

de-colonization. Does it also address more general questions such as the form of government to which the population of a state is entitled in order to achieve 'internal' self-determination?

The right of self-determination was and is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as Article 1 apart from and before all of the other rights in the two Covenants.

2) Non-discrimination

Articles 2, 3 and 26 deal with the principle of non-discrimination but the Covenant neither defines the term 'discrimination' nor indicates what constitutes discrimination. However, Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Similarly, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

While these Conventions deal only with cases of discrimination on specific grounds, the Human Rights Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, Article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits the sentence from being carried out on pregnant women.

Furthermore, Article 25 guarantees certain political rights, differentiating on grounds of citizenship.

The Committee has also pointed out that the principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.

3) Equality between men and women

Article 3 of the Covenant requires, States Parties to ensure the equal right of men and women to the enjoyment of all civil and political rights provided for in the Covenant.

This Article requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of the rights. Simply enacting laws cannot do this. Hence, in addition to purely legislative measures of protection, it is to be seen that what progress is being made or what factors or difficulties are being met in this regard.

4) Right to life

Article 6 addresses the right to life, a phrase as central to the human rights corpus as it is elliptic and open to a range of interpretations. It is the supreme right from which no derogation is permitted even in time of public emergency, which threatens the life of the nation.

The Committee has noted that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life, which confront humanity today. Therefore, the Committee has expressed its growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all. Hence, the Committee is of the view that the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

5) Freedom from torture

Article 7 concerns torture and cruel or degrading treatment or punishment. The aim of the provisions of Article 7 is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

The prohibition in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition must extend to corporal punishment including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.

To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In this connection, States Parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

6) Freedom from slavery and servitude

The Covenant categorically declares that no one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude. No one shall be required to perform forced or compulsory labour but there is an exception that in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court is allowed. Similarly, the term "forced or compulsory labour" shall not include: (a) Any work or service, normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such

detention; (b) Any service of a military character; (c) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; and (d) Any work or service which forms part of normal civil obligations (Article 8).

7) Right to liberty and security

Article 9 declares that:

- a) Everyone has the right to liberty and security of person; no one shall be subjected to arbitrary arrest or detention;
- b) No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law;
- c) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him;
- d) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release;
- e) That it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment;
- f) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful; and
- g) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Liberty of person concerns freedom from confinement of the body, not a general freedom of action and security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity. Examples of deprivation of liberty include police custody, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported. They also include certain further restrictions on a person who is already detained, for example, solitary confinement or the use of physical restraining devices. During a period of military service, restrictions that would amount to deprivation of liberty for a civilian may not amount to deprivation of liberty if they do not exceed the exigencies of normal military service or deviate from the normal conditions of life within the armed forces of the State Party concerned.

‘Everyone’ includes, among others, girls and boys, soldiers, persons with disabilities, transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.

The right to liberty of person is not absolute. Article 9 recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws. The term ‘arrest’ refers to any apprehension of a person that commences a deprivation of liberty, and the term ‘detention’ refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release. Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.²⁰⁵

Article 9 requires that procedures for carrying out legally authorized deprivation of liberty should also be established by law and States Parties should ensure compliance with their legally prescribed procedures. It also requires compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer, where individuals may be detained, when the detained person must be brought to court and legal limits on the duration of detention. It also requires compliance with domestic rules providing important safeguards for detained persons, such as making a record of an arrest and permitting access to counsel.²⁰⁶

Article 9 imposes two requirements for the benefit of persons who are deprived of liberty; (i) they shall be informed, at the time of arrest, of the reasons for the arrest; (ii) they shall be promptly informed of any charges against them.

Asylum seekers who unlawfully enter a State Party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons.

8) Human treatment to detainees

Article 10 applies to detained person. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State

²⁰⁵ See concluding observations: Guatemala (CCPR/C/GTM/CO/3, 2012), para. 16.

²⁰⁶ 1412/2005, *Butovenko v. Ukraine*, para. 7.6.

Party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

States Parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).

Lastly, under Article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation.

Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State Party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice. States should give relevant information about the age groups of persons treated as juveniles. In that regard, States Parties are invited to indicate whether they are applying the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.²⁰⁷

²⁰⁷ Known as Beijing Rules, 1987

9) No imprisonment in contractual obligations

Article 11 provides that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. This is based on the principle that there shall not be criminality in civil transactional matters. The prohibition on imprisonment for inability to fulfil a contract protects against imprisonment as a punishment for inability to pay a private debt or to fulfil another type of contractual condition owed to another person or corporation.

This prohibition arose from the incidence of ‘debtors prisons’, under which a person could be imprisoned for failure to pay a private debt. This practice was in use in the United Kingdom in the nineteenth century, but was abolished by statute in 1869. There is evidence that persons were imprisoned for the inability to pay a debt in the Australian colonies in the nineteenth century.

The prohibition in the ICCPR does not apply to obligations arising from statute. The reference to ‘inability’ indicates that the person must be incapable of fulfilling the obligation rather than simply unwilling to do so. The word ‘merely’ indicates that the prohibition does not protect people who have committed some other offence in addition to the contractual breach.

The prohibition on imprisonment for inability to fulfil a contract is an absolute right. This means that it cannot be limited or qualified under any circumstance. Under article 4 of the ICCPR, countries may take measures derogating from certain of their obligations under the Covenant ‘in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. However, the prohibition on imprisonment for inability to fulfil a contract is specifically excluded from the obligations from which derogation is permitted but the ‘merely clause is important: the article does not forbid imprisonment where there is an extra element like fraud or negligence. What it does prevent is imprisonment solely on the ground of failing to pay a contractual debt or fulfilling some other contractual obligation.’²⁰⁸

10) Freedom of movement

Freedom of movement and residence is one of the fundamental rights declared in the Covenant. Article 12 declares that everyone lawfully within the

²⁰⁸ [https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Prohibitiononimprisonmentforinabilitytofulfi
lacontract.aspx](https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Prohibitiononimprisonmentforinabilitytofulfilcontract.aspx)

territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Similarly, everyone shall be free to leave any country, including his own.

These rights shall not be subject to any restrictions other than restrictions imposed by law which are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. Similarly, no one shall be arbitrarily deprived of the right to enter his own country.

Liberty of movement is an indispensable condition for the free development of a person. Therefore, Article 12 provides for exceptional circumstances in which rights may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. Only those restrictions must be imposed that are provided by law, and are necessary in a democratic society for the protection of these purposes, and must be consistent with all other rights recognized in the Covenant.

11) Rights of aliens

Even aliens have some guaranteed rights. An alien lawfully in the territory of a State Party to the present Covenant may be expelled from that country only in pursuance of a decision reached in accordance with law. He can be expelled where there are compelling reasons of national security. His case shall be reviewed by, and be represented for the purpose before the competent authority or a person or persons especially designated by the competent authority (Article 13).

The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in Article 2 which applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while Article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.

The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise. Consent for entry may be given subject to conditions

relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State Party they are entitled to the rights set out in the Covenant.

12) Procedural safeguards

Under Article 14 the presumption of innocence is fundamental to the protection of human rights. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

Article 14(3)(a) applies to all cases of criminal charges, including those of persons not in detention. The right to be informed of the charge ‘promptly’ requires that information be given in the manner described as soon as a competent authority first makes the charge.

13) Protection from retrospectivity

It is general maxim of law that no penalty can have retrospective effect. This protection is declared in Article 15 of the Covenant that says that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

Similarly, no heavier penalty can be imposed than the one that was applicable at the time when the criminal offence was committed and if, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit from it.

However, nothing shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

14) Right to recognition before law

Article 16 of the Covenant guarantees that everyone shall have the right to recognition everywhere as a person before the law. This Article has come into sharp focus with the phenomenon of enforced or involuntary disappearances, the practice of certain countries of snatching, detaining and likely killing people, with their families seldom able to find out their fate. However, failure to achieve recognition before the law as required by Article 16 is, of course, much broader than the issue of enforced disappearance. In some countries women still do not

have the same rights under the law as men. For example, there are some countries where women need their husband's permission to apply for a passport. Similarly, stateless people are excluded from some or even all laws and systems designed to protect a country's citizens with a devastating impact not just on stateless people themselves but their children and grandchildren and even their births cannot be registered, because their parents do not exist in the eyes of the law. They may suffer violations of almost the entire range of social, political, economic and civil rights: unable to vote, marry, get an education, bring a court case, or receive medical care.²⁰⁹

15) Right to Privacy

Article 17 is meant to save people from arbitrary or unlawful interference with their privacy, family or correspondence, and unlawful attacks on their honour and reputation. The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law.

Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive process and use it, and is never used for purposes incompatible with the Covenant. In order to have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes, every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

16) Freedom of thought, conscience and religion

The Covenant declares that everyone shall have the right to freedom of thought, conscience and religion including: (a) this right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private; (b) right to manifest his religion or belief in worship, observance, practice and teaching; (c) no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice; (d) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and

²⁰⁹ <http://www.standup4humanrights.org/layout/files/30on30/UDHR70-30on30-article6-eng.pdf>

freedoms of others; (e) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions (Article 18)

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) is far-reaching and profound as it encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in Article 4 (2) of the Covenant.

This right protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. The Article is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore viewed with concern any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community.

The right distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference and no one can be compelled to reveal his thoughts or adherence to a religion or belief. Similarly, the freedom to manifest religion or belief may be exercised either individually or in community with others and in public or private.

The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest, observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. Furthermore, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as, the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

The Committee is of the view that Article 18 (4) permits public school instruction in subjects such as the general history of religions and ethics if it is

given in a neutral and objective way and guarantees the liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions and that public education that includes instruction in a particular religion or belief accommodates the wishes of parents and guardians.

The Committee has held that Article 18 (3): (a) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law; and (b) are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others; (c) in interpreting the scope of permissible limitation clauses, States Parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in Articles 2, 3 and 26; (d) limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in Article 18; (e) restrictions shall be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security; (f) limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated; (g) restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner; (h) persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint and (i) States Parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under Article 18 and on the nature and length of alternative national service.

17) Freedom of opinion and expression

The Covenant declares that (a) everyone shall have the right to hold opinions without interference; (b) everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice; (c) the exercise of the rights provided for in this Article carries with it special duties and responsibilities and it may, therefore, be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (i) for respect of the rights or reputations of others; and (ii) for the protection of national security or of public order (ordre public), or of public health or morals (Article 19).

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society.²¹⁰ They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association.

Freedom of opinion is not listed among those rights that may not be derogated from pursuant to the provisions of Article 4 of the Covenant, but the Committee has recalled that, ‘in those provisions of the Covenant that are not listed in Article 4, paragraph 2, there are elements that in the Committee’s opinion cannot be made subject to lawful derogation under Article 4’ and freedom of opinion is one such element, since it can never become necessary to derogate from it during a state of emergency.²¹¹

The obligation to respect freedoms of opinion and expression is binding on every State Party as a whole. All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level, national, regional or local, are in a position to engage the responsibility of the State Party.²¹² Such responsibility may also be incurred by a State Party under some circumstances in respect of acts of semi-State entities. The State Party must also ensure that persons are protected from any acts of private persons or entities that would impair the enjoyment of freedoms of opinion and expression in so far as these Covenant rights are amenable to application between private persons or entities.²¹³

States parties are required to ensure that the rights contained in Article 19 of the Covenant are enshrined in the domestic law of the State, in a manner consistent with the guidance provided by the Committee in its general comment on the nature of the general legal obligation imposed on States Parties to the Covenant.

Article 19 requires protection of the right to hold opinions without interference and the Covenant permits no exception or restriction. All forms of opinion are protected, including, but not limited to, opinions of a political, scientific, historic, moral or religious nature. The harassment, intimidation or stigmatisation of a person, including arrest, detention, trial or imprisonment for

²¹⁰ Benhadj v. Algeria, No. 1173/2003; Tae-Hoon Park v. Republic of Korea, No. 628/1995.

²¹¹ General comment No. 29, para. 11.

²¹² General comment No. 31, para. 4.

²¹³ General Comment No. 31, para. 8; Gauthier v. Canada, No. 633/1995.

reasons of the opinions they may hold, constitutes a violation of Article 19.²¹⁴ Similarly, any form of coerced effort to shape opinion or any action to compel the disclosure of an opinion is prohibited.²¹⁵

This right guarantees the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. This right extends to the guarantee of the expression of every form of subjective idea and opinion capable of transmission to others, subject to the provisions in Article 19. It includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, religious discourse and commercial advertising.

This right protects all forms of expression and the means of their publication; such forms include, but are not limited to, the spoken and written word and such non-verbal expression as images and objects of art and means of expression include books, newspapers, pamphlets, posters, banners and legal submissions and include all forms of audio-visual as well as electronic and internet-based media.

The Committee held that a free, uncensored and unhindered press or other media is essential in any society for the ensuring of freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. Pursuant to Article 19, the public also has the right to receive information as a corollary to the specific function of any journalist to impart information. Therefore, States Parties must (a) take particular care to encourage an independent and diverse media; (b) promote and protect access to the media for minority groups; (c) ensure that public broadcasting services operate in an independent manner.²¹⁶

Article 19 embraces a general right of access to information held by public bodies including all records held by a public body, regardless of the form in which the information is stored, its source and the date of production and the public bodies include all levels of State bodies and organs, including the judiciary and with regard to the carrying out of public functions, it may include other bodies.

The States Parties should (a) enact the necessary procedures, such as by means of freedom of information legislation²¹⁷ and procedures should provide for the rapid processing of requests for information according to clear rules that are

²¹⁴ *Mpaka-Nsusu v. Zaire*, No. 157/1983; *Primo Jose Essono Mika Miha v. Equatorial Guinea*, No. 414/1990.

²¹⁵ *Yong-Joo Kang v. Republic of Korea*, No. 878/1999.

²¹⁶ Concluding observations on Republic of Moldova (CCPR/CO/75/MDA).

²¹⁷ Concluding observations on Azerbaijan (CCPR/C/79/Add.38 (1994)).

compatible with the Covenant; (b) make arrangements for appeals from refusals to provide access to information (c) fix fees for the processing of requests for information but fee should not be such as to constitute an unreasonable impediment to access to information; (d) should provide reasons for any refusal to provide access to information; and (e) should make every effort to ensure easy, effective and practical access to state-controlled information in the public domain.

18) Prohibition on propaganda and hatred

The Covenant guarantees that (a) any propaganda for war shall be prohibited by law and (b) any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law (Article 20)

In the views of the Committee, the Article 20 states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities.

The prohibition extends to all forms of (a) propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations; (b) advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned.

19) Right of peaceful assembly

The Covenant declares that (a) the right of peaceful assembly shall be recognized; (b) no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in (i) the interests of national security (ii) public safety, (iii) public order (*ordre public*), (iv) the protection of public health or morals or the protection of the rights and freedoms of others (Article 21).

The right to freedom of peaceful assembly is the right to gather publicly or privately and collectively express, promote, pursue and defend common interests. This right includes the right to participate in peaceful assemblies, meetings, protests, strikes, sit-ins, demonstrations and other temporary gatherings for a specific purpose. States not only have an obligation to protect peaceful assemblies, but should also to take measures to facilitate them.

The rights to freedom of peaceful assembly and association are among the most important human rights we possess as these rights protect ability to come

together and work for the common good. They are a vehicle for the exercise of many other civil, cultural, economic, political and social rights, allowing people to express their political opinions, engage in artistic pursuits, engage in religious observances, form and join trade unions, elect leaders to represent their interests and hold them accountable.

The philosophical origins of this right are not cultural, or specific to a particular place and time; rather, these rights are born from our common human heritage, rooted in the simple fact that every civilization is built upon cooperation and collaboration, from many and not one. It is human nature and human necessity that people come together to collectively pursue their interests for a just society.

Everyone has the right to peaceful assembly and (a) States parties shall not limit this right for certain groups based on race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status; (b) under international law, the right to freedom of peaceful assembly is not absolute; (c) Assemblies can be subject to certain restrictions; (d) such measures must be prescribed by law; (e) the measures shall be ‘necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others’; (f) any restrictions must meet a strict test of necessity and proportionality; (g) freedom must be the rule and not the exception; (h) restrictions should never impair the essence of the right; and (h) International law only protects assemblies which are peaceful, and the peaceful intentions of those assembling should be presumed.²¹⁸

20) Freedom of association

The ICCPR declares that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests and no restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. Similarly, this article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Similarly, this Article shall not authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would

²¹⁸ <http://freeassembly.net/about/freedoms/>

prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention (Article 22).

The right to freedom of association allows to join a formal or informal group to take collective action and this right includes the right to form and/or join a group. The right to freedom of association also includes the right of groups to access funding and resources. Conversely, it includes the right not to be compelled to join an association including civil society organizations, clubs, cooperatives, NGOs, religious associations, political parties, trade unions, foundations or even online associations and whether these are registered or not.

Similarly, States Parties are obliged to take positive measures to establish and maintain an enabling environment for associations and States Parties must also refrain from unduly obstructing the exercise of the right to freedom of association, and respect the privacy of associations. The States Parties may place certain restrictions on the right to freedom of association but such measures must be prescribed by law and ‘necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others’. Any restrictions on the right to freedom of association must meet a strict test of necessity and proportionality.

21) Protection of Family

Article 23 concerns the protection of the family. The right to found a family implies, in principle, the possibility to procreate and live together. When States Parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.

During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.

The Covenant does not establish a specific marriageable age either for men or for women, but that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law. In this connection, the Committee wishes to note that such legal provisions must be compatible with the full exercise of the other rights guaranteed by the covenant.

22) Rights of Children

Article 24 gives brief and general provision on children's rights. A treaty devoted to such issues was later drafted and is now in effect, The Convention on the Rights of the Child.

In most cases, however, the measures to be adopted are not specified in the Covenant and it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction. The Committee notes that such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural.

For example, every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children and to prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means. In the cultural field, every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression.

23) Right to public affairs

Article 25 of the ICCPR declares that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and (c) To have access, on general terms of equality, to public service in his country.

Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant and it recognizes and protects the rights of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.

No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with Article 25. Any conditions

which apply to the exercise of the rights protected by Article 25 should be based on objective and reasonable criteria.

The conduct of public affairs is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by Article 25 should be established by the constitution and other laws.

The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. State parties should describe the reasonable legal provisions which establish the conditions for holding elective public office, and any limitations and qualifications which apply to particular offices. Reports should describe conditions for nomination, e.g. age limits, and any other qualifications or restrictions.

The elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. To achieve these ends, an independent electoral authority should be established to supervise the free and fair electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant.

Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secure tenure, ensure that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25.

24) Equality before the law

Under the Covenant, all persons are equal before the law and are entitled without any discrimination to the equal protection of the law and for this purpose, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 26)

The Committee is of the view that non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights; therefore, Article 2 of the Covenant obligates each State Party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Committee noted that the Covenant neither defines the term 'discrimination' nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Therefore, the Committee thinks that while these Conventions deal only with cases of discrimination on specific grounds, the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. However, it may be clarified that the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance e.g. Article 6 prohibits the death sentence from being imposed on persons below 18 years of age only.

The Committee has also observed that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.²¹⁹

25) Right of minorities

Article 27 of the Covenant declares that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Committee observed that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State Party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.

The Article confers rights on persons belonging to minorities which ‘exist’ in a State Party; so, it is not relevant to determine the degree of permanence that the term ‘exist’ connotes; therefore, migrant workers or even visitors in a State Party constituting such minorities are entitled not to be denied the exercise of those rights, including the general rights, for example, to freedom of association, of assembly, and of expression. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.

5. Derogations and destructions

(1) Article 4 deals with time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. In such emergency, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant (a) to the extent strictly required by the exigencies of the situation, (b) such measures shall not be inconsistent with their

²¹⁹ Human Rights Committee: Thirty-seventh session Adopted: 10 November 1989 General Comment No. 18 Non-discrimination

other obligations under international law; (c) do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin; (d) derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 cannot be made.

When the derogation is made, then the State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.

Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State Party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, Article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards.

Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers.

Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: Article 6 (right to life), Article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), Article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), Article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), Article 15 (the principle of legality in the field of criminal law, Article 16 (the recognition of everyone as a person before the law), and Article 18 (freedom of thought, conscience and religion).

The qualification of non-derogability does not mean that no limitations or restrictions would ever be justified; rather it means that the permissibility of restrictions is independent of the issue of derogability.

(2) Under Article 5 no provision in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein. Similarly, no limitation, of greater extent than is provided for in the present Covenant, can be applied to limit or derogate from human rights enshrined in their Covenant.

Furthermore, the Covenant protects human rights available in other instruments. It declares that there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

6. Human Rights Committee

Articles 8-45 of the First Optional Protocol of the Covenant describe the organization and dominant functions of the ICCPR Committee, now called the Human Rights Committee.

- (1) Article 40 requires State Parties to submit report on measures taken to give-effect to the undertaking of the Covenant. The Committee is to study these reports.
- (2) The same Article instructs the Committee to transmit such General Comments, as it may consider appropriate, to these state parties.
- (3) The Optional Protocol authorizes the Committee to receive and consider 'communications' from individuals claiming to be victims of violations by States Parties of the Covenant and to forward its 'views' about communications to the relevant individuals and states.

Article 28-31 of the Covenant provides information about the Committee's membership. The 18 members are to have 'high moral character and recognized competence in the field of human rights. Article 31(2) says that consideration in election 'shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and the principal legal systems'. All members are to be elected and shall serve in their personal capacity²²⁰ whereas on UN Commission sit representative of the states.

The Committee meets for three sessions annually; each three weeks long, at UN headquarter in Geneva (twice) and New York. However, working groups meet for one week before the start of each session. Most meetings are public, are poorly attended by outsiders and get little press coverage in a stark contrast to the publicity and notoriety of the UN Commission.

Decision should formally be made by majority vote²²¹ but in fact all decisions to date have been taken by consensus.

The Committee, like the UN Commission, has witnessed vast changes in global politics. Though the earlier ideological disputes and North-South

²²⁰Article 28(3) of ICCPR

²²¹ 2.Article 39(2)

controversies have now become blunted, yet these have left a strong impact on the Committee.

Under Article 40, member states are required to 'submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights'. Reports shall indicate factors and difficulties, if any, affecting the implementation of the present Covenant. The ICCPR Committee is to study the reports and transmit its general comments to the State Parties. The states respond to comments. State Party now presents reports every five years though Committee can request report at shorter intervals. The reports serve two purposes:-

- (1) Confront the state with facts derived from sources other than the report.
- (2) It provides an opportunity of 'constructive dialogue' with members.

It is encouraging to note that 50 years ago, it was nearly impossible that most of the world's states would periodically submit a report to an international Committee about the domestic matters and then participate in a discussion about that report but now submission of reports have become a familiar requirement.

The Committee submitted to 1993 World Conference on Human Rights in Vienna a report on its work and plans. We summarize recent developments in Committee's approach to reports:

1. The Committee listed the several times it had requested states including Iraq, Peru etc. to submit a report within three months about a new situation.
2. The Committee supported the Secretary General's proposal that human rights bodies may be allowed to bring massive human rights violations to the attention of the Security Council.
3. When the Committee is satisfied that no alternate way is available to obtain information, it can ask the State Party concerned to receive a mission with a view to collect information which the Committee needs to carry out its functions under the Covenant.

The Committee on several occasions has issued various guidelines/General Comments to help the states in filing reports under Article 40. These General Comments are issued to make this experience available for the benefit of all states in order to promote their further implementation of the Covenant, to suggest improvements in the supporting procedure and to stimulate the activities of the states and international organizations in the promotion and protection of human rights. Their summary is as under:

- (1) The reporting obligations should embrace not only the relevant laws and other norms relating to obligations under the Covenant but also

practices and decisions of courts and other organizations of the State Party, the progress achieved and factors and difficulties in implementing the obligations under the Covenant.²²²

- (2) The State Parties should provide more detailed information on the steps taken to ensure that equality before including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice and the States should specify the relevant Constitutional and legislative text which can help understand it.²²³
- (3) States should explain laws and mechanisms to protect against unlawful and arbitrary interference. The report should also include information on the authorities and organs set up within the legal system of the State which are competent to authorize interference. States should make clear the extent to which actual practice conforms to the law.²²⁴
- (4) Reports by States Parties should indicate how legislation and practice ensure that measures of protection aimed at removing all discrimination in every field, including inheritance, particularly as between children who are nationals and children who are aliens or as between legitimate children and children born out of wedlock.²²⁵
- (5) The Committee considers it useful that reports provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.²²⁶
- (6) The Committee wishes to know if there remain any problems of discrimination in fact, which may be practiced either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.²²⁷
- (7) States Parties should include in their report information concerning the system for supervising penitentiary establishments, the specific

²²² 1981 Report

²²³ 1984 Report

²²⁴ 1988 Report

²²⁵ 1989 Report

²²⁶ Ibid

²²⁷ Ibid

measures to prevent torture and cruel, inhuman and degrading treatment, and how impartial supervision is ensured.²²⁸

Under First Optional Protocol of ICCPR, individuals who claim to be victims of a violation, by a State Party to the Protocol of, any of the rights set forth in the Covenant can complain. After being notified of the Communication, the State Party shall submit to the Committee written explanation or statements clarifying the matter. The Committee is to forward its views to the individual and state concerned.

Unlike the requirements for procedure 1235 and 1503 of the UN Commission on Human Rights, now Human Rights Council, these Communications to the Committee need not allege that violations are systemic. Here isolated violation suffices to found the Communication.

Here only written Communications can be made; no oral presentation or confrontation is allowed. Discussions are also 'closed'. In addition, no fact-finding missions are envisaged.

A Working Group of five Committee members meets a week before each three-week session to consider the admissibility of the communication. Only the committee can decide that a communication is inadmissible. This First Optional Protocol is one of only three human rights treaties of universal applications (the two others being the Convention on Racial Discrimination and Convention on Torture) that provides an individual remedy at the international level.

However, under Article 5(2)(b) of the First Optional Protocol, an individual can only make communication when he has exhausted all available domestic remedies but this shall not be the rule where the application of the remedies is unreasonably prolonged.

In *Miango v Zaire*,²²⁹ the author alleged the torture and killing by the military of the author's brother. The communication stated that in Zaire, only a military tribunal could deal with cases involving soldiers, and the author despaired of any hope that the case of his brother's death would be properly investigated. The Committee following its normal procedure transmitted the communication to the state and requested information. It received no submission from Zaire and then found the Communication admissible. The Committee observed that Article 6 and 7(1) of the ICCPR had been violated.

However, the Committee is not a court or tribunal but its duty is to ensure that State Parties fulfil their obligations under the Covenant. It is an executive and guardian organ of the Covenant. It has a role as an executive and guardian organ of

²²⁸ 1992 Report

²²⁹ Communication No. 194/1983

the Covenant. It has a role as a promoter, monitor or supervisory body with respect to improving human rights performances.²³⁰

²³⁰ Dominic Mc Goldrick, *The Human Rights committee*, 1991 at 54

Chapter Eight

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. Context

The Universal Declaration of Human Rights (UDHR) entails two sets of human rights: civil and political rights, as well as, economic, social and cultural rights.

In translating the Declaration's poetic and aspirational provisions into legally binding obligations, the United Nations adopted in 1966 Covenant on Economic, Social and Cultural Rights, and covenant on Civil and Political Rights (came into force in 1976), which taken together constitute the bedrock of the international normative regime in relation to human rights, which taken together constitute the bedrock of the international normative regime in relation to human rights.

The recognition of economic and social rights has diffused historical origins. All the revealed religions exhort to care for those in need and those who cannot look after themselves. Other sources include philosophical analyses,²³¹ the political programmes of 19th century Fabian socialists in Great Britain, Chancellor Bismark in Germany,²³² and the New Dealers in the United States and constitutional precedents such as the Mexican Constitution of 1917, the Soviet Constitution and the 1919 Constitution of Weimer Republic.

The modern International human right laws start from International Labour Organization (ILO) which was established by the Treaty of Versailles in 1919 to abolish the 'injustice, hardship and privation' which workers suffered and to guarantee 'fair and humane conditions of labour'; it was conceived as the response of Western countries to the ideologies of Bolshevism and Socialism arising out of the Russian Revolution. The ILO started adopting international minimum standards in relation to freedom of association and the right to organize trade unions, forced labour, minimum working age, hours of work, weekly rest, sickness

²³¹ e.g. of Thomas Paine, Karl Marks, Immanuel Kant, John Rawls etc.

²³² Bismarck introduced social insurance schemes in the 1880s

protection, accident, invalidity and old-age insurance, and freedom from discrimination in employment.²³³

The USA Great Depression of 1930's and British economist Lord Keynes (d.1946) emphasized the need for social protection of the unemployed. Member States made some proposals during drafting of the UN Charter for enshrining 'full employment' as a commitment. The United States strongly opposed it because it would lead to interference in the domestic affairs. Resultantly agreement was reached on Article 55(a) of the Charter, which calls on Member States to promote higher standards of living, full employment, and conditions of economic and social progress and development'.

Interestingly in 1941, President Roosevelt nominated 'freedom from want' as one of the four freedoms that should characterize the future World Order. This approach was reflected in a draft International Bill of Rights, completed in 1944 by a Committee appointed by the American Law Institute (ALI). All these proposals proved highly influential in the preparation of the Articles 22-28 of Universal Declaration of Human Rights (UDHR) and US was a strong supporter of these Articles proposed by Communist and Latin American countries. The International Covenant on Economic, Social and Cultural right translated these pronouncements of rights into binding treaty obligations. As of September 2018, the Covenant has 169 parties. A further four countries, including the United States, have signed but not ratified the Covenant.

2. Raison detre

According to United Nations Development Report 1991:

- (a) Over one billion people, out of a world population of 5.3 billion live in absolute poverty.
- (b) Some 180 million children, one in three, suffer from serious malnutrition.
- (c) One and a half billion people are deprived of primary health care.
- (d) Nearly three million children die each year from immunizable diseases.

²³³ Philip Alston (ed) "United Nations and Human Rights: A Critical Appraisal", 580, (1992)

- (e) About half a million women die each year from causes related to pregnancy and childbirth.
- (f) About a billion adults cannot read or write.
- (g) Well over 100 million children of primary school age are in not school.
- (h) Girls' primary enrolment rate are a little over two-thirds that of males.
- (i) Female literacy is still only two-thirds of males.
- (j) Over 100 million people live below poverty line in industrial market economies.

This is a state of affairs in 1990s, what will be state of affairs in 1940s. Definitely, worse than that as the latter part of the 20th century has witnessed great efforts in development, poverty alleviation and better income distribution. It was this state of affairs which coupled with a communist threat, convinced the world leaders especially the West to work for and approve the International Covenant on Economic, Social and Cultural Rights (the Covenant).

3. Basic principles

The Preamble of the Covenant enunciates the following principles, (same as we have discussed in civil and political rights) which permeate the Covenant:

- (a) There is an inherent dignity of human persons and all rights enshrined in the Covenant spring from this fountain.
- (b) Freedom from fear and want is the ideal for which human beings should strive.
- (c) The ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic social and cultural rights, as well as his civil and political rights.
- (d) Every individual has duties to other individuals and to the community to which he belongs.

- (e) Every individual is under responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.²³⁴

4. Overview

The Covenant was adopted by the General Assembly on 16 December 1966²³⁵ and entered into force on 3 January 1976. It is divided into five parts:

Part 1 (Article 1) recognizes the rights of all peoples to self-determination including the right to freely determine their political status, pursue their economic, social and cultural goals, and manage and dispose of their own resources. It recognises a negative right of a people not to be deprived of its means of subsistence, and imposes an obligation on those parties still responsible for non-self-governing and trust territories (colonies) to encourage and respect their self-determination.

Part 2 (Articles 2–5) establishes the principle of ‘progressive realisation’. It also requires the rights be recognised ‘without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. The rights can only be limited by law, in a manner compatible with the nature of the rights, and only for the purpose of ‘promoting the general welfare in a democratic society’.

Part 3 (Articles 6–15) lists the rights themselves.

Part 4 (Articles 16–25) governs reporting and monitoring of the Covenant and the steps taken by the parties to implement it. It also allows the monitoring body – originally the United Nation Economic and Social Council, and now the Committee on Economic, Social and Cultural Rights to make general recommendations to the UN General Assembly on appropriate measures to realise the rights (Article 21).

Part 5 (Articles 26–31) governs ratification, entry into force, and amendment of the Covenant.

²³⁴ The Preamble of the International covenant on Economic, Social and Cultural Rights

²³⁵ By UN General Assembly Resolution No. 2200 A (XXI)

The Covenant declares the following rights and principles:

- 1) Right of self-determination (Article 1)
- 2) Equality of men and women (Article 3)
- 3) Right to work and training (Article 6)
- 4) Right to just and favourable conditions of work (Article 7)
- 5) Right to form and join trade unions (Article 8)
- 6) Right to social security (Article 9)
- 7) Protection of and assistance to family (Article 10)
- 8) Right to an adequate standard of living (Article 11)
- 9) Right to physical and mental health (Article 12)
- 10) Right to education (Article 13)
- 11) State's duty to provide compulsory and free education (Article 14);
and
- 12) Right to cultural life and scientific development (Article 15).
- 13) States to adopt all means to achieve realization of these rights (Article 2);
- 14) Limitations in enjoyment of rights only for promoting the general welfare of a democratic society (Article 4);
- 15) Derogation from and destruction of rights not permitted (Article 5).

The Covenant is essentially a 'promotional convention' stipulating objectives more than standards and requiring implementation over the time rather than all at once. One obligation is, however, subject to immediate application: the prohibition of discrimination in the enjoyment of the rights enumerated on grounds of race, colour, sex, language, religion, or political or other opinion, national or social origin, property, birth or other status. Also, the international supervisory measure

that apply to the Covenant oblige the State parties to report to a UN Committee on the steps they have adopted and the progress they have made in achieving the realization of enumerated rights.

5. Right guaranteed

1) Right of self-determination

Article 1 of the Covenant declares that all peoples have the right of self-determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Similarly, all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. Therefore, the States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The concept of self-determination is personified in the Charter of the United Nations and the International Covenant on Civil and Political Rights (hereinafter referred to as ICESCR) and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as ICCPR). This concept is a principle on international law which allows the people of a state to determine the sovereignty and political status of that state without any interference; however, there is no precise definition as to the concept of self-determination.

The principles of self-determination may have been outlined after the First World War but these ideas were constructed upon after the Second World War. The concept of self-determination was constantly raised during the Second World War and the concept was proclaimed under several provisions in the Atlantic Charter 1941. These provisions later influenced the San Francisco Conference 1945 where the concept was enshrined into the United Nations Charter. The said concept is

mentioned in Article 1(2) and Article 55 of the United Nations Charter and is referred to in Article 73 and 76 of the Charter.

Article 1 in the ICESCR and Article 1 in the ICCPR was adopted in the United Nations Charter and it also reinstated the right of self-determination to the people. Both the ICESCR and ICCPR provide sufficient proof to the meaning and concept of self-determination. The concept was further elaborated in the adoption of the Friendly Relations Declaration in 1970.

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as Article 1 apart from and before all of the other rights in the two Covenants.

2) Equality of man and woman

Article 3 of the Covenant declares that the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

The equal right of men and women to the enjoyment of all human rights is one of the fundamental principles recognized under international law and enshrined in the main international human rights instruments. This provision is founded on Article 1(3) of the United Nations Charter, Article 2 of the Universal Declaration of Human Rights and Article 3 of the International Covenant on Civil and Political Rights (ICCPR), which was drafted at the same time as the ICESCR. Similarly, Article 2(2) of the ICESCR states a guarantee of non-discrimination on the basis of sex among other grounds. This provision and the guarantee of equal enjoyment of rights by men and women in Article 3 are integrally related and mutually reinforcing. Moreover, elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on the basis of equality.

Substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are gender-neutral on their face. In implementing Article 3, States Parties should consider that such laws, policies

and practice can fail to address or even perpetuate inequality between men and women, because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.

The obligation to fulfill equality, requires States Parties to take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality. The State parties shall also make available and accessible all appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes including appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women.²³⁶

3) Right to work and training

Article 6 of the Covenant declares that State Parties have recognized that everyone has the right to work.²³⁷ This Right includes opportunity to gain his living by work, which he freely chooses or accepts. The Parties are enjoined to take all appropriate steps to safeguard this right. State Parties are to provide technical and vocational guidance and introduce policies for full and productive employment.²³⁸

The right to work is a fundamental right, recognized in several international legal instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR), as laid down in Article 6, deals more comprehensively than any other instrument with this right. The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity.

The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community. The right to work is an

²³⁶ <https://www.escr-net.org/resources/general-comment-n-16-article-3-equal-right-men-and-women-enjoyment-all-economic-social-and>

²³⁷ We will discuss here only those rights which have not been discussed under UDHR or ICCPR

²³⁸ Article 6 of ICESCR

individual right that belongs to each person and is at the same time a collective right. It encompasses all forms of work, whether independent work or dependent wage-paid work. The right to work should not be understood as an absolute and unconditional right to obtain employment.

Under its Article 2 and 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality.

Article 3 of the Covenant prescribes that States Parties undertake to ‘ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights’. The Committee underlines the need for a comprehensive system of protection to combat gender discrimination and to ensure equal opportunities and treatment between men and women in relation to their right to work by ensuring equal pay for work of equal value.

Access to a first job constitutes an opportunity for economic self-reliance and in many cases a means to escape poverty. Young persons, particularly young women, generally have great difficulties in finding initial employment. National policies relating to adequate education, vocational training and employment should be adopted and implemented to promote and support access to employment opportunities for young persons, in particular young women, older persons and persons with disabilities.²³⁹

The UN Committee on Economic, Social and Cultural Rights (CESCR) provided detailed guidance to States regarding their obligations to respect, protect and fulfil the right to work. The Committee also noted that the right includes the following interrelated and essential features:

- (a) **Availability:** States must ensure the existence of tailored services to help people to identify employment opportunities and find work;

²³⁹ Committee on Economic, Social and Cultural Rights, Thirty-fifth session; Geneva, 7-25 November 2005, THE RIGHT TO WORK, General comment No. 18.

- (b) **Accessibility:** Access to work involves three key elements: (a) non-discrimination; (b) physical accessibility; and (c) information accessibility. Discrimination in access to and continuation of employment is prohibited. States must ensure that reasonable accommodation is made so that work places are physically accessible, particularly for persons with physical disabilities. Everyone has the right to seek, obtain and impart information on employment opportunities.
- (c) **Acceptability and quality:** The right to work comprises several interrelated components, including the right to choose and accept work freely, just and favourable conditions of work, safe working conditions, and the right to form trade unions.²⁴⁰

4) Right to just and favourable conditions of work

Under Article 7 State Parties have recognized the right of every one to the enjoyment of just and favorable conditions of work. The right includes:

- (a) Fair wages;
- (b) Equal remuneration for work of equal value without distinction of any kind;
- (c) Decent living of worker and his family;
- (d) Safe and healthy working conditions;
- (e) Opportunities for promotion to an appropriate higher level, subject to seniority and competence;
- (f) Rest and leisure;
- (g) Reasonable limitation of working hours;
- (h) Periodic holidays; and
- (i) Remuneration for public holidays.

²⁴⁰ <https://www.escr-net.org/rights/work>

The right of everyone to the enjoyment of just and favourable conditions of work is recognized in the International Covenant on Economic, Social and Cultural Rights and other international and regional human rights treaties as well as related international legal instruments including ILO conventions and recommendations. The enjoyment of the right to just and favourable conditions of work is a prerequisite for, and result of, the enjoyment of other Covenant rights, for example, the right to the highest attainable standard of physical and mental health, by avoiding occupational accidents and disease, and an adequate standard of living through decent remuneration.

The right to just and favourable conditions of work is a right of everyone, without distinction of any kind. The reference to ‘everyone’ highlights the fact that the right applies to all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers.

The term ‘remuneration’ goes beyond the more restricted notion of ‘wage’ or ‘salary’ to include additional direct or indirect allowances in cash or in kind that should be of a fair and reasonable amount paid by the employer to the employee, such as grants, contributions to health insurance, housing and food allowances, and on-site affordable childcare facilities.

Preventing occupational accidents and disease is a fundamental aspect of the right to just and favourable conditions of work and closely related to other Covenant rights, in particular the right to the highest attainable level of physical and mental health. The State Parties shall also address at design, testing, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (working environment and work processes), the relationship between the main elements of work and the physical and mental capacities of workers, including protection of workers and representative organizations from disciplinary measures when they have acted in conformity with the national policy.

Rest and leisure, limitation of working hours as well as paid periodic holidays help workers to maintain an appropriate balance between professional and personal responsibilities and to avoid work-related stress, accidents and disease. Working days in all activities should be limited to a specified number of hours. While the

general daily limit (without overtime) should be eight hours and exceptions should be strictly limited and subject to consultation with workers and their representative organisations. The number of hours of work per week should also be limited through legislation. Rest during the day is important for workers' health and safety and therefore legislation should identify and protect rest periods during the work day. All workers must enjoy weekly rest periods. All workers must have paid annual leave. Legislation should identify the entitlement, at a minimum, of three working weeks of paid leave for one year of full-time service. Leave due to illness or other justified reasons should not be deducted from paid annual leave. Workers should benefit from a set number of public holidays with payment of wages equivalent to those for a normal working day.

The right to just and favourable conditions of work means different things to specific workers: (i) women workers; (ii) young and older workers; (iii) workers with disabilities; (iv) workers in the informal economy; (v) migrant workers; (vi) domestic workers; (vii) self-employed workers; (viii) agricultural workers; ix) Refugee workers and (x) unpaid workers.

All workers should be free from physical and mental harassment, including sexual harassment. Legislation, should define harassment broadly, with explicit reference to sexual and other forms of harassment, such as on the basis of sex, disability, race, sexual orientation, gender identity, and intersex status.²⁴¹

5) Trade unions

Under the Covenant, States Parties have to ensure (a) right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests; (b) that no restrictions may be placed on the exercise of this right; (c) only those restrictions can be imposed that (i) are prescribed by law; and (ii) which are necessary in a democratic society in (iii) the interests of national security or (iv) public order or (v) for the protection of the rights and freedoms of other.

²⁴¹ <https://www.escr-net.org/resources/general-comment-no-23-2016-right-just-and-favorable-conditions-work>

The trade unions have the right to establish national federations or confederations and the right of the latter to form or join international trade-union organizations and it is the right of trade unions to function freely subject to no limitations other than those (i) prescribed by law and which are (ii) necessary in a democratic society (iii) in the interests of national security or public order or for the protection of the rights and freedoms of others. The workers or their unions have the right to strike, provided that it is exercised in conformity with the laws of the particular country.

However, the Article does not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State. Similarly, nothing in this Article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

The right to work is a fundamental right, recognized in several international legal instruments and it is essential for realizing other human rights and forms an inseparable and inherent part of human dignity and survival.

Collective bargaining is a tool of fundamental importance in the formulation of employment policies. The promotion of employment also requires effective involvement of the community and, more specifically, of associations for the protection and promotion of the rights of workers and trade unions in the definition of priorities, decision-making, planning, implementation and evaluation of the strategy to promote employment.

Any person or group who is a victim of a violation of the right to work should have access to effective judicial or other appropriate remedies at the national level and at the national level, the trade unions play an important role in defending the right to work. Trade unions play a fundamental role in ensuring respect for the right to work at the local and national levels and in assisting States Parties to comply with their obligations under the Article. The role of trade unions is fundamental and will

continue to be considered by the Committee in its consideration of the reports of States Parties.²⁴²

6) Right to social security

Article 9 of the Covenant provides that, ‘The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.’

The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights. Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.

The Committee observed that the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; and (c) insufficient family support, particularly for children and adult dependents.

Under Article 2 (1), States Parties must take effective measures, and periodically revise them when necessary, within their maximum available resources, to fully realize the right of all persons without any discrimination to social security, including social insurance. These measures can include: (a) contributory or insurance-based schemes such as social insurance, which is expressly mentioned in Article 9; (b) non-contributory schemes such as universal schemes (which provide the relevant benefit in principle to everyone who experiences a particular risk or contingency) or targeted social assistance schemes of social security.²⁴³

²⁴² Committee on Economic, Social and Cultural Rights, Thirty-fifth session, Geneva, 7-25 November 2005, General comment No. 18, Adopted on 24 November 2005, GE.06 -40313 (E) 080206

²⁴³ Committee Thirty-ninth session 5-23 E/C.12/GC/19:
<https://www.refworld.org/docid/47b17b5b39c.html>

7) **Protection of family**

Family is regarded as the natural and fundamental group unit of society. Normal family life is must for the care and education and development of children. Therefore, Article 10 of the Covenant declares that the States Parties to the present Covenant recognize that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

Similarly, special protection should be accorded to mothers during a reasonable period before and after a childbirth and during such period working mothers should be accorded paid leave or leave with adequate social security benefits.

Furthermore, special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation and their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

There are two main principles underlying the right to respect for family life as it relates to children: (1) the family is the natural and fundamental unit of society; and (2) maintaining the family unit is in the best interests of the child. There are numerous treaty provisions that explicitly recognize the family as the natural and fundamental unit of society. These provisions, however, do not stop there, but also obligate states to afford the family unit broad protection. For example:

- (a) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
- (b) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society.
- (c) The family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children,

should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

- (d) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
- (e) The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.
- (f) The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.”

Similarly, maintaining the Family Unit is in the best interests of the child and the main relevant Convention of Rights of Child. The ‘best interests of the child’ standard is also the prevailing legal standard governing court ordered separation of children from their families all over the world.

8) Adequate standard of living

The parties recognize the right of every one to an adequate standard of living for himself and his family. This includes adequate food, clothing and housing, and to the continuous improvement of living conditions. The states are bound to take appropriate steps to ensure the realization of this right.

The states, recognizing the fundamental right of every one to be free from hunger, have to take, individually and through international co-operation, the measures:

- (a) To improve method of production, conservation and distribution of food by making full use of scientific knowledge and by developing or reforming agrarian systems for the optimal utilization of natural resources;
- (b) Considering the problems of both food importing and food exporting countries, to ensure an equitable distribution of food supplies in relation to the need.²⁴⁴

The human right to adequate food is recognized in several instruments under international law and pursuant to Article 11, States Parties recognize that more

²⁴⁴ Article 11

immediate and urgent steps may be needed to ensure the fundamental right to freedom from hunger and malnutrition. The human right to adequate food is of crucial importance for the enjoyment of all rights. The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.

The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The right to adequate food shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The right to adequate food will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as even in times of natural or other disasters.

The Committee considers that the core content of the right to adequate food implies:

- (a) The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;
- (b) The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights;
- (c) Dietary needs imply that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that follow human physiological needs at all stages throughout the life cycle and according to gender and occupation;
- (d) Free from adverse substances sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad

environmental hygiene or inappropriate handling at different stages throughout the food chain;

- (e) Cultural or consumer acceptability implies the need also to consider, as far as possible, perceived non-nutrient-based values attached to food and food consumption;
- (f) Availability refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand; and
- (g) Accessibility encompasses both economic and physical accessibility.

The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights. The right to adequate housing applies to everyone while the reference to ‘himself and his family’ must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must not be subject to any form of discrimination.

Similarly, in the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense; rather it should be seen as the right to live somewhere in security, peace and dignity. ‘Adequate housing’ means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities, all at a reasonable cost. It is determined by social, economic, cultural, climatic, ecological and other factors, including: a) Legal security of tenure; b) availability of services, materials, facilities and infrastructure; c) affordability; d) habitability, e) accessibility; f) Location; and g) Cultural adequacy.

i. Physical and mental health

The states recognized the right of every one to the enjoyment of the highest attainable standard of physical and mental health. The State Parties should take steps for the realization of this right. The step should include that are necessary for:

- (a) The provision for the reduction of the still birth rate and of infant mortality and for the healthy development of child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all, medical service and medical attention in the event of sickness.²⁴⁵

Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights. In Article 12, the Covenant, did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity’ but declares ‘the highest attainable standard of physical and mental health’ that embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include (a) the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation and the entitlements include (b) the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

²⁴⁵ Article 12

The Committee interprets the right to health as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State Party:

- (a) Availability: Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State Party;
- (b) Accessibility: Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State Party. Accessibility has four overlapping dimensions: (i) Non-discrimination; (ii) Physical accessibility; (iii) Economic accessibility (affordability); and Information accessibility;
- (c) Acceptability: All health facilities, goods and services must be respectful of medical ethics and culturally appropriate; and
- (d) Quality: As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality.

The provision for the reduction of the still birth rate and of infant mortality and for the healthy development of the child requires measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.

The improvement of all aspects of environmental and industrial hygiene includes preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful

substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health. The prevention, treatment and control of epidemic, endemic, occupational and other diseases require the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity.²⁴⁶

10) Right to education

States recognize the right of everyone to education. Article 13 describes the following objectives of the education:

- (a) Full development of human personality and sense of its dignity;
- (b) Strengthening the respect for human rights and fundamental freedoms;
- (c) Enabling all persons to participate effectively in a free society;
- (d) Promoting understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups; and further the activities of the United Nations for the maintenance of peace.

With a view to achieving the full realization of this right, states recognize that:

- (a) The primary education shall be compulsory and available free to all;
- (b) Secondary education, including technical and vocational, shall be made generally available and accessible to all;
- (c) Higher education shall be made equally accessible to all;
- (d) Schools system should be developed at all levels; and
- (e) Parents will have liberty to choose schools for education of their children.

²⁴⁶ <https://www.refworld.org/pdfid/4538838d0.pdf>: CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4)

Furthermore, this Article shall (a) not be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in the Article; and (b) require that the education given in such institutions shall conform to such minimum standards as may be laid down by the State (Article 13).

In the light of this universal right to the education, Article 14 mandates that each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction, compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Everyone has the right to education as education is important in itself and is often also called a ‘multiplier’ human right, as the degree of access to education impacts the level of enjoyment of other human rights. States should develop a national framework that will progressively expand and improve the educational system and successively introduce free education at all other levels, namely secondary, higher, and fundamental education. Every State should respect the right to educational freedom. This includes respect for the religious and moral convictions of children and parents, the right of parents or legal guardians to choose private schools for their children, and the freedom to establish private educational institutions as long as they conform to national standards for curricula and admissions.

The Committee also noted that the right includes the following interrelated and essential features:

- (a) Availability: States should ensure the provision of enough educational infrastructure (institutions and programs) for everyone;
- (b) Accessibility: Access to education involves three key elements: non-discrimination, physical accessibility, and economic accessibility;
- (c) Acceptability: Subject to the overarching aims of education and to minimum educational standards set by the State, curricula and teaching methods should be acceptable to students and, in appropriate cases, parents; and

- (d) Adaptability: Education should be flexible enough to adapt and respond to changing societies and the needs of students within diverse social and cultural settings.²⁴⁷

11) Cultural rights

Under Article 15 States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Similarly, States Parties shall take steps to achieve the full realization of this right and it shall include those necessary for the conservation, the development and the diffusion of science and culture. Furthermore, States Parties undertake to respect the freedom indispensable for scientific research and creative activity and they recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world. The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State Party both abstention (i.e., non- interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods). The decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality.

In the Committee's view, culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression "cultural life" is an explicit

²⁴⁷ <https://www.escr-net.org/rights/education>

reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future. The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society. The Committee considers that culture encompasses, *inter alia*, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.

The terms “to participate” and “to take part” have the same meaning and are used interchangeably in other international and regional instruments. There are, among others, three interrelated main components of the right to participate or take part in cultural life: (a) participation in, (b) access to, and (c) contribution to cultural life.

The following are necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination for all including persons and communities requiring special protection like women, children, persons with disabilities, minorities, migrants, indigenous peoples and persons living in poverty:

(a) **Availability** is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature; the shared open spaces essential to cultural interaction; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history;

(b) **Accessibility** consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination.¹⁵ It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated;

(c) *Acceptability* entails that the laws, policies, strategies, programmes and measures adopted by the State Party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved;

(d) **Adaptability** refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State Party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities; and

(e) **Appropriateness** refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples.²⁴⁸

6. ICCPR and IESCR

Just as the ICCPR elaborates upon most of the civil and political rights enumerated in the UDHR, so the ICESCR elaborates upon most of the economic, social, and cultural rights set forth in the Universal Declaration.

The interdependence of the civil and political rights, and economic, social and cultural rights, is reflected in the preamble to the ICESCR, which says that ‘in accordance with the Universal Declaration... the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights’.

The terminology used in the ICESCR to describe the obligations of states varies in significant respects from that used in the ICCPR. Whereas the ICCPR contains terms such as ‘everyone has the right to..’ or ‘no one should be’, the ICESCR employs the formula ‘state parties recognize the right of everyone to...’ The principal exceptions are Article 3 (equal right of men and women) and Article 8 (trade union related rights), under each of which the states ‘undertake to ensure’

²⁴⁸ Committee on Economic, Social and Cultural Rights Forty-third session
2–20 November 2009: <https://www.refworld.org/docid/4ed35bae2.html>

the relevant rights; and Article 2(2) (non-discrimination) where the undertaking is ‘to guarantee’.

Unlike ICCPR, the ICESCR is not geared, with modest exception, to immediate implementation, the States Parties having agreed only ‘to take steps’ towards ‘achieving progressively the full realization of the rights in the Covenant’ and then subject to ‘maximum of their resources’ as:

- (a) Under Article 2(1) the ICESCR obligation of States Parties is recognized subject to the availability of resources whereas there is no corresponding section in the ICCPR; and
- (b) Under Article 2(2) of the ICESCR, the States parties have to undertake steps with a view to achieving progressively the full realization of the rights whereas, rights under the ICCPR require immediate realization.

7. Optional Protocol

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) is an international treaty establishing complaint and inquiry mechanisms for the International Covenant on Economic, Social and Cultural Rights. It was adopted by the UN General Assembly on 10 December 2008, and opened for signature on 24 September 2009, and entered into force on 5 May 2013. As of October 2018, the Protocol has 45 signatories and 24 state parties.

When people cannot access justice in the courts of their country for violations of economic, social and cultural rights (ESCR), they can bring a complaint to the UN Committee on Economic, Social and Cultural Rights (CESCR); however, their country must first become a party to the OP-ICESCR treaty through ratification or accession.

The Optional Protocol includes three procedures:

- (a) A complaints procedure
- (b) An inquiries procedure
- (c) An inter-State complaints procedure

1) Complaints Procedure

- (a) Provides an opportunity to seek remedy and compensation in individual cases when a State violates ESCR;
- (b) Provides the possibility to access a procedure to seek justice at the international level when access to justice at the national level has been denied;
- (c) Provides the CESCR with an opportunity to advance new jurisprudence (legal interpretation about the content of State's obligations) on ESCR;
- (d) Provides a legal mechanism within which contributions of claimants, States, third parties and the Committee itself can help to further define and clarify the nature and scope of the ESCR protected under the ICESCR;
- (e) Individuals or groups of individuals, who allege to be victims of violations of the ICESCR and who have not found effective remedies within their own country, can file a complaint;
- (f) Third persons may file complaints on behalf of these individuals or groups of individuals with their consent; and
- (g) Third persons may file complaints on behalf of presumed victims, without their consent, but must justify acting on their behalf.

2) The Inquiry Procedure

When a State Party agrees to be bound by the inquiry procedure, the Committee will also be able to initiate and conduct investigations into grave or systematic violations of ESCR. This procedure adds to the complaints and periodic reporting procedures as it:

- (a) Allows the Committee to respond in a timely fashion to serious violations taking place within a State Party instead of waiting until the State's next periodic report to the CESCR is submitted;
- (b) Offers a means to adequately address systematic or widespread violations of ESCR in cases where individual complaints are not adequate to reflect the extent of the situation; and

- (c) Addresses situations where individuals or groups are unable to submit complaints due to practical constraints or fear of reprisals.

3) The Inter-State Complaints Procedure

The OP-ICESCR also includes a second opt-in procedure, the inter-State complaints procedure. States that opt in to this procedure can make complaints against other States Parties and have complaints made against them.

8. Enforcement procedure

The Committee on Economic, Social and Cultural Rights (the Committee) oversees implementation of the ICESCR through its consideration of reports, individual complaints, inter-State complaints, and inquiry requests, and its preparation of general comments, substantive statements, open letters, and general discussion days.

The CESCR consists of 18 independent experts who are persons of high moral character and recognized competence in the field of human rights. Members of the CESCR serve four-year terms and can be re-elected if re-nominated by States Parties to the ICESCR. The CESCR holds two sessions per year: a three-week plenary session and a one-week pre-session working group in Geneva, Switzerland. The mechanisms of the Committee are:

1) Reports:

- (a) Initially, a State must make a report on its implementation two years after ratifying or acceding to the ICESCR. Following the initial report, periodic reports are then requested every five years thereafter;
- (b) The reporting system requires each State Party to submit: (1) a common core document, which lists general information about the reporting State, a framework for protecting human rights, and information on non-discrimination and equality; and (2) a treaty-specific document, which accounts for specific information relating to the implementation of articles 1 to 15 of the ICESCR and any national law or policies taken to implement the ICESCR for which detailed guidelines are prescribed by the Committee;

- (c) After submission, the Committee initially reviews the report through a five-person pre-sessional working group that meets six months prior to the report being considered by the full Committee. The pre-sessional working group will then issue a list of written questions to the State Party, and the State Party will be required to answer prior to making their scheduled appearance before the Committee;
- (d) Representatives of each reporting State are invited to engage in a constructive dialogue with the Committee; and
- (e) Concluding Observations are then drafted and later adopted by consensus following a private discussion by the Committee.

2) Individual complaints:

- (a) The CESCR may consider individual complaints that allege a violation of one or more rights protected under the ICESCR if the State responsible is a party to the First Optional Protocol to the ICESCR.
- (b) The Committee is authorized to accept individual complaints as of May 5, 2013, provided the complaint meets the requirements identified in articles 1 through 4 of the Optional Protocol are met.

3) State complaints:

- (a) Article 10 of the Optional Protocol to the ICESCR provides a mechanism for States to complain about violations of the ICCPR made by another State.
- (b) This procedure for inter-State complaints; however, has never been used.

4) Inquiries:

- (a) The Committee can also consider inquiries on grave or systematic violations of any of the rights set forth in the ICESCR.
- (b) State Parties may opt out of the inquiry procedure at any time by declaring that the State does not recognize the competence of the Committee to undertake inquiries.

- 5) **Comments:** The Committee also prepares general comments interpreting the ICESCR's articles and provisions in order to assist State Parties in fulfilling their obligations.
- 6) **Statements:** The Committee adopts statements to clarify its position with respect to certain obligations under the ICESCR following major developments and other issues regarding its implementation.
- 7) **Letters:** The Committee also sends letters to State Parties addressing ICESCR commitments.
- 8) **General debate:** The Committee regularly devotes one day of its general sessions to discuss either a particular right or a particular aspect of the ICESCR; however, the Committee does not have a mechanism in place for urgent interventions.

8. Role of ILO

The Treaty of Versailles established the ILO in 1919. It plays an important function in the field of economic and social rights. For example, such matters as the regulation of the hours of the work, the prevention of unemployment, the provision of adequate wages, social security, equal pay for equal work, freedom of association etc. The ILO has been pioneer in the international protection of economic and social rights and has an impressive record of achievement in the field.

There are two principal aspects of this work: (i) standard-setting; and (ii) measures of implementation. As regards standard setting, the ILO employs two principal methods: (i) the conclusion of international conventions; and (ii) the adoption of recommendations. The conventions of course, are binding only on the states, which ratify them. Recommendations on the other hand do not create legal obligations for the states. Their purpose is rather to set standards. Since its creation the ILO has adopted more than 170 international conventions. The number of recommendations is even larger than the number of conventions.

The following conventions may be noted as among the most important from the point of view of human rights: the Convention on the Freedom of Association and Protection of the Rights to Organize (1949), the Convention on the Right to Organize and Collective Bargaining (1949), the Equal Remuneration Convention

(1951), the Abolition of Forced Labor Convention (1953), the Discrimination Convention (1958), the Employment Policy Convention (1964), the Workers with Family Responsibilities Convention (1983), and the Indigenous and Tribal People's Convention.²⁴⁹

The system of international control operated by the ILO is considerably more effective than that provided in the United Nations Covenants. In the first place there is ILO reporting. It is provided in the Constitution of the ILO itself; therefore, it applies to all member states, and not only to parties to specific conventions. Under Article 9 and 22 of the Constitution, the member states are required to report to the ILO on the measures they have taken in connection with the conventions and recommendations. The governments must send copies of their reports to the national organizations of employers and workers who thus have the opportunity to comment on them if they so desire. The observations must then be communicated by the governments to the ILO.

Another important element is the examination of the government reports by an independent organ made of the people who are not government officials. This is secured in the ILO system at two stages: (i) First, there is a Committee of Experts on the Application of Conventions and Recommendations. This Committee of 20 members is appointed not by governments, but by the Governing Body of the ILO. They are the persons who are experts in the legal and social matters. The Committee can make observations on any situation, which it regards as not in conformity with those obligations; (ii) The second stage of supervision takes place at the International Labour Conference, which each year appoints a Committee on the application of Conventions and Recommendations. This Conference Committee of 200 members consists of experts of governments, employers and workers. It examines the reports of the Committee of Experts and reports back to the Plenary Conference.

²⁴⁹ F. Wolf, "ILO experience in implementing the human rights" *Journal of Law and Economics*, X, (1975), p 599

In addition to these reporting procedures, the ILO Constitution also provides for a complaint procedure and ‘Representation’ procedure through which investigation can be initiated.²⁵⁰

One state may bring a complaint against another, if it considers that the latter is not complying with the obligations of a Convention by which both are bound. Under Representation procedure, a trade union or an organization of employers can claim that a Convention is not being observed and the matter will be investigated by a Special Committee appointed by the Governing Body of the ILO. The ILO has set up a special procedure to protect freedom of association. More than 1600 cases have been handled so far by this procedure.

9. Role of UNESCO

Several of the Specialized Agencies of the United Nations are concerned with the protection of social and economic rights. The Food and Agriculture Organization, for example, does important work in helping governments to improve and increase food supplies, so helping to combating undernourishment and starvation. These activities were carried on long before the adoption of the Covenant in 1966, but nevertheless are directly relevant to the obligations assumed by States in Article 11 of the International Covenant on Economic, Social and Cultural Rights.

Similarly, the WHO is directly relevant to the right of everyone to the enjoyment of the highest attainable state of physical and mental health recognized in Article 12 of the same Covenant. The World Bank is likewise concerned with the rights of all peoples to freely pursue their economic development.²⁵¹

Article 1 of the Constitution of UNESCO states that ‘purpose of the organization is to contribute to peace and security by promoting collaboration among nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms. The promotion of human rights and fundamental freedoms is thus affirmed as one of UNESCO’s aims when undertaking activities in the fields of education science and culture. It is, therefore, evident that UNESCO should be able to make a significant

²⁵⁰ H Hannum, “Guide to International Human Rights Practice” second edition, Philadelphia, 1992, at p 99

²⁵¹ Text can be seen in Brownlie, “Basic Documents” p381

contribution to the work of ECOSOC and the Committee on Economic, Social and Cultural Rights.

UNESCO produced the Convention against Discrimination, adopted by General Assembly in 1960. This Convention undertakes to eliminate and prevent discrimination in education based on race, colour, sex, language and other grounds. It provides that primary education shall be free and compulsory, and secondary and higher education generally available and accessible. These provisions correspond to Article 13 of the Covenant.

To supervise the reporting procedure, a special committee to examine the reports of member states was established in 1965. This committee is now called 'Committee on conventions and Recommendations' with a membership of 30. The Committee must first decide whether the communication is admissible. Then it tries to bring about a friendly settlement of the matter. It normally examines 35 communications at each session. It is also required to submit reports on these activities to the Executive Board of General Conference, which considers these reports in private or public meetings keeping in view the seriousness of the violation.²⁵²

²⁵² Weiss and Farley, "The UNESCO Human Rights Procedure" *The Human Rights Quarterly*, XVI, 1994, P391

Chapter Nine

WOMEN EMPOWERMENT

1. Introduction

In most of the areas of the world, the traditional and cultural patterns perpetuate and reinforce the subordination of woman in the social, cultural, economic, and political spheres. Societies in general are patriarchal, where decisions are taken by man i.e. husband, father or eldest son. Man is considered the legal representative, the repository of authority while the woman is relegated to household task and to look after her husband and children. She is also responsible for generating additional income or consumer goods. In case of a careless father, the entire responsibility for the support of the children devolves upon her. Women are restricted in choice of husband and are sometimes subject to honour killing in certain societies. Similarly, maltreatment of women and domestic violence is not normally and adequately defined as offences against the person.

Women are much less likely than men to be literate. Nearly two-thirds of the world's illiterate adults are women, a proportion that has remained stubbornly unchanged for the past 20 years, according to a global report assessing progress towards gender equality, published on Tuesday. Of the 781 million adults over the age of 15 estimated to be illiterate, 496 million were women. Women made up more than half the illiterate population in all regions of the world. Efforts to improve girls' access to schooling were accelerated under the Millennium Development Goals (MDGs) and significant progress has been recorded in primary school enrolment and attendance rates but an estimated 58 million of primary aged children are still out of school, 31 million of them girls, the majority living in sub-Saharan Africa. Gender disparities increased in secondary and tertiary education, despite more young people enrolling over the past 20 years. Over the age of 65, 30% of women and 19% of men were found to be illiterate. In South Asia, female literacy rates are only around 50% those of males.

Around one in three women had been the victim of physical or sexual violence – around two-thirds of them faced violence or death at the hands of an intimate partner or

family member. The report found that around 60% of all women survivors did not report the crime or seek support. Researchers found that one in three married women in poorer countries had no control over spending on major household purchases, and about one in 10 married women had no say over how the money they earned was spent. Three-quarters of one-parent households were women with children, who were more likely to be poorer than single-parent families with men and child dependents.²⁵³

In developing countries the employment participation rate of women are on average only 50% those of men (in South Asia 20% and in the Arab states only 10%). Wage discrimination is common even in industrial countries. Their works are poorly paid. In Japan, Women receive only 51% of male wages.²⁵⁴ In most countries men tend to participate in labour markets more frequently than women. All over the world, labour force participation among women of working age increased substantially in the last century. In some parts of the world, the historical increase in female labour force participation has slowed down or even regressed slightly in recent years. Women all over the world allocate a substantial amount of time to activities that are not typically recorded as 'economic activities'. Hence, female participation in labour markets tends to increase when the time-cost of unpaid care work is reduced, shared equally with men, and/or made more compatible with market work.²⁵⁵

Low political participation and representation of the women in political institutions surely contributes to their further marginalization in the decision-making processes. Consider the following statistical information. In 1980 they made up just over 10% of the world's parliamentarians and less than 4% of national cabinets. In 1993, only six countries had women as heads of government.²⁵⁶

The following percentage refer to the seats in Legislatures occupied by women in 1992: Finland 39%, Norway 38%, Cuba 23%, China 21%, Pakistan 17%,² Tanzania 11%, USA 10%, UK 9%, Russia 9%, India 7%, France 6%, and Egypt 2%.²⁵⁷

²⁵³ <https://www.theguardian.com/global-development/2015/oct/20/two-thirds-of-worlds-illiterate-adults-are-women-report-finds>

²⁵⁴ Human rights Report, 1993, at p. 25

²⁵⁵ <https://ourworldindata.org/female-labor-force-participation-key-facts>

²⁵⁶ 17th Constitutional Amendment, 31st December, 2003

²⁵⁷ UNDP Women Development report, 1994, p 144

This is the state of affairs despite the stress upon the equal protection norm in the following provisions in the UN Charter and the other International instruments that have entered into force long ago:

- 1) The Charter's preamble states the determination of the peoples of the United Nations to reaffirm faith 'in the equal rights of men and women.'. Article 1(3) sets forth the organization's purpose of promoting respect for human rights "for all without distinction as to race, sex language, or religion. Article 55(c) is to similar effect.
- 2) Article 2 of the Universal Declaration states that "everyone" is entitled to the rights declared, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Under Article 16, men and women are 'entitled to equal rights as to marriage, during marriage and at its dissolution.'
- 3) Under Article 2 of the ICCPR, the states undertake to ensure to all within their territory the rights recognized in the covenant 'without distinction of any kind.' The list of prohibited distinctions is identical with that above in the UDHR. States further undertake in Article 3 to 'ensure the equal right of men and women' to enjoyment of all rights set forth in the Covenant. Under Article 23(4), states are to take 'appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.' Article 26 contains undertakings by states to prohibit discrimination on the same grounds as those identified in the UDHR.
- 4) Similar anti-discrimination provisions appear in the International covenant on Economic, Social and Cultural Rights.

2. Basic structure of CEDAW

The basic treaty in the field is the Convention on Elimination of all Forms of Discrimination against Women (CEDAW). The treaty entered into force in 1981.

The Convention has a similar format to the Convention on the Elimination of All Forms of Racial Discrimination, both with regard to the scope of its substantive

obligations and its international monitoring mechanisms. The Convention is structured in six parts with 30 articles total.

- 1) **Part I** (Articles 1-6) focuses on non-discrimination, sex stereotypes, and sex trafficking.
- 2) **Part II** (Articles 7-9) outlines women's rights in the public sphere with an emphasis on political life, representation, and rights to nationality.
- 3) **Part III** (Articles 10-14) describes the economic and social rights of women, particularly focusing on education, employment, and health. Part III also includes special protections for rural women and the problems they face.
- 4) **Part IV** (Article 15 and 16) outlines women's right to equality in marriage and family life along with the right to equality before the law.
- 5) **Part V** (Articles 17-22) establishes the Committee on the Elimination of Discrimination against Women as well as the states parties' reporting procedure.
- 6) **Part VI** (Articles 23-30) describes the effects of the Convention on other treaties, the commitment of the States Parties and the administration of the Convention.

It will be useful to characterize the obligations of states under CEDAW's varied provisions with the following scheme:

Respect: the duty to treat persons equally, to respect their individual dignity and worth, hence not to interfere with or impair their declared rights – that is, the classical ‘hands-off’ duties of liberal states that are correlative to individual rights;

Protect: the duty to extend protection against violations of rights by the state as well as by non-state actors (individuals or organizations); hence, the duty to create and administer an adequate system of police, law enforcement, and civil and criminal justice;

Provide: the duty to ensure, to assure individuals of defined minimum levels of welfare, to improve (and not only refrain from worsening) the situation of individuals up to such levels, that is, the type of duty elaborated in the International Covenant on Economic, Social and Cultural Rights, as in its Article 11 where States Parties undertake to ‘ensure the realization’ of the right of everyone to an adequate standard of living; and

Promote: the (varied and often indeterminate) duty to take measures such as education to reduce violations of rights, to train people to help to gain recognition of their own rights, to transform (to one or another extent) existing attitudes inimical to realization of rights.²⁵⁸

3. Rights guaranteed

CEDAW guarantees the following rights:

- 1) Article 1: no discrimination;
- 2) Article 2: measures against discrimination;
- 3) Article 3: full development of women;
- 4) Article 4: affirmative actions;
- 5) Article 5: eliminating prejudices;
- 6) Article 6: suppressing trafficking in women;
- 7) Article 7: right to public life;
- 8) Article 8: right to represent;
- 9) Article 9: right to nationality;
- 10) Article 10: right to education;
- 11) Article 11: right to employment;
- 12) Article 12: right to health;
- 13) Article 13: right to economic and social life;
- 14) Article 14: rights of rural women;
- 15) Article 15: equality before the law; and
- 16) Article 16: right to marriage and family.**

1) No Discrimination

The Convention defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality

²⁵⁸ Steiner, International Human Rights in Context, Oxford Press, 1996, at p 908

of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁵⁹

Three vital characteristics of the definition of the discrimination ought to be noted:

- a) The Article refers to effect as well as purpose, thus directing attention to the consequences of governmental measures as well as the intentions underlying them;
- b) The definition is not limited to discrimination through ‘state action’ or action by persons acting under colour of law, as are the definitions of many rights such as the definition of torture under the Convention against Torture; and
- c) The concluding phrase, ‘or any other field’ further expands the definition’s range.²⁶⁰

2) Measures against discrimination

States Parties condemned discrimination against women in all its forms and agreed to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. For this purpose, they undertook:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

²⁵⁹ Article 1 of CEDAW

²⁶⁰ Steiner, p 907

- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; and
- (g) To repeal all national penal provisions which constitute discrimination against women (Article 2)

Through the Articles the lines are blurred between the private and public spheres of life and the range of obligations on states to intervene in the private sector go beyond ‘respect’, to protect, ensure and provide.²⁶¹

3) Full Development of Women

The member states are obliged to take in the political, social, economic and cultural fields, all appropriate measures to ensure the full development and advancement of women to guarantee them the exercise and enjoyment of human rights and fundamental freedoms.²⁶²

To ensure the full development and advancement of women is a grand goal set forth for states. No other international human rights regime contains a similar concept or goal for any group or people (Article 3).

4) Affirmative actions

States are obliged to adopt temporary special measures aimed at accelerating *de facto* equality between men and women. These measures will not be considered discriminatory. However, these measures shall be discontinued when the objectives of equality of opportunity and treatment

²⁶¹ Article 2

²⁶² Article 3

have been achieved.²⁶³ It is to be noted that Article 6 of ICCPR prohibits the death sentence being carried out on pregnant women.

This affirmative action clause also appears in the Convention on the Elimination of all Forms of Racial discrimination but it is not provided in International Convention on Civil and Political Rights. The envisaged affirmative action is not to discriminate against men but to discriminate in favour of women – just to help them to fill the gap already existing between men and women in terms of opportunity and treatment (Article 4).

5) Elimination of prejudices

The states are bound to take all appropriate measures to modify the social and cultural patterns of conduct of men and women with the clean objective of the elimination of prejudices and other customary practices, which are based on the concept of the inferiority of women or the superiority of the men. The states should also project proper understanding of maternity as an important social function and the recognition of the common responsibility of men and role of women in the upbringing and development of their children and it shall be understood that the interest of the children is the primordial consideration in all cases (Article 5).

6) Suppressing trafficking in women

Article 6 of the Convention obliges States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation or prostitution of women.

7) Right to public life

The Convention directs all States Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all

²⁶³ Article 4

public functions at all levels of government; and (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country (Article 7).

8) Right to represent

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations (Article 8).

9) Right to nationality

Normally women are discriminated against in the matters of nationality. Traditionally they follow the nationality and domicile of their husbands. The Convention asks the member states to grant women equal rights with men to acquire, change or retain their nationality. Under the new regime, neither the marriage to an alien nor change of nationality of husband during the marriage shall automatically change the nationality of wife, render her stateless, or force upon her the nationality of her husband. It is true with respect to the nationality of their children.²⁶⁴ In nutshell, women can and will have now nationality of their own choice emanating from their own free existence, independent of their husbands. They are no more dependent variable (Article 9).

10) Right to education

As already discussed, the women folk lag behind the men in the field of education and that is a major cause of their backward status in the society. Article 10 makes it obligatory on the member states to take all appropriate measures to eliminate discrimination against women in order to ensure the equal rights with men in the fields of general education, and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for (i) career and vocational guidance, for (ii) access to studies and for (iii) the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in

²⁶⁴ Article 9

pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

(b) Access to (i) same curricula, (ii) same examinations, (iii) same teaching staff with qualifications of the same standard, (iv) similar school premises; and (v) equipment of the same quality;

(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;

(d) The same opportunities to benefit from scholarships and other study grants;

(e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

(f) The reduction of female student dropout rates and the organization of programmes for girls and women who have left school prematurely;

(g) The same opportunities to participate actively in sports and physical education; and

(h) Access to specific educational information to help to ensure the health and wellbeing of families, including information and advice on family planning (Article 10).

11) Right to employment

Under Article 11 of the Convention, States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining,

including apprenticeships, advanced vocational training and recurrent training; (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

Similarly, in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

Furthermore, the State parties shall review periodically protective legislation relating to matters in the light of scientific and technological knowledge and it shall be revised, repealed or extended as necessary.

12) Right to health

The States Parties are mandated to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. Similarly, the States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation (Article 12).

13) Right to economic and social life

The States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to

ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits; (b) The right to bank loans, mortgages and other forms of financial credit; and (c) The right to participate in recreational activities, sports and all aspects of cultural life (Article 13).

14) Rights of rural women

CEDAW addresses the problem particularly faced by rural women and recognizes the significant role they play in the economic survival of their families, including their work in the non-monetized sectors of the economy. It obligates the States Parties to take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

Similarly, the States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (a) To participate in the elaboration and implementation of development planning at all levels; (b) To have access to adequate health care facilities, including information, counselling and services in family planning; (c) To benefit directly from social security programmes; (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency; (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment; (f) To participate in all community activities; (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes; and (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications (Article 14).

15) Equality before Law

Under Article 15, the States Parties shall accord to women equality with men before the law and shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to

administer property and shall treat them equally in all stages of procedure in courts and tribunals.

Similarly, the States Parties agree that all contracts and all other private instruments of any kind with a legal effect, which is directed at restricting the legal capacity of women, shall be deemed null and void. Furthermore, the States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.²⁶⁵

16) Right to marriage and family

The States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, ward ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Similarly, the betrothal and the marriage of a child shall have no legal effect on parents, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

²⁶⁵ Article 15

4. The Committee

For considering the progress made in the implementation of the present Convention, a Committee on the Elimination of Discrimination against Women had to be established. The committee consists of 23 experts of high moral standing and competence in the fields covered by the convention. The State Parties from among their nationals select the experts but they serve in their personal capacity. In selection process, considerations have to be given to equal geographical distribution and to the representation of the different forms of civilizations as well as the principal legal systems.²⁶⁶

The current composition of the Committee is largely in accordance with that injunction. At the same time, one of the most striking features of CEDAW's membership is that, with one exception, all its members have been women. In contrast to other Treaty bodies, only about half of the experts who serve, as CEDAW members are lawyers. Other members come from such areas as medicine, public health and hospital administration, political science, geography, trade union and labour relations, social work and engineering. Nearly all the members have been involved in some manner with feminist or other groups working to advance the position of women.

The member states submit for consideration of the Committee (through Secretary General of the UN) a report on the legislative, judicial, administrative and other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect. Reports may also indicate factor and difficulties affecting the degree of fulfilment of obligations under the Convention.²⁶⁷

The Committee normally meets for a period of not more than two weeks annually in order to consider the reports.²⁶⁸ The Committee, through the Economic and Social Council, annually reports to the General Assembly of the UN on its activities and may make recommendations.²⁶⁹

²⁶⁶ Article 17

²⁶⁷ Article 18

²⁶⁸ Article 20

²⁶⁹ Article 21

The Committee has endorsed the concept of a 'constructive dialogue'. This approach envisions the State Parties and the Committee as engaged in a joint enterprise to advance the goals of the Convention by the cooperative endeavours involving the exchange of information, ideas and suggestions. One feature of the Committee has been to press State Parties to provide information that shows actual position of women in their societies without painting an excessively favourable picture.

Chapter Ten

PROTECTION FROM TORTURE

1. Introduction

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment (the ‘Convention’) is an international human rights instrument that aims to prevent torture around the world.²⁷⁰ The Convention requires states to take effective measures to prevent torture within their boundaries, and forbids states to transport people to a country where there is reason to believe that they will be tortured.²⁷¹

The General Assembly, on 9 December 1975, adopted ‘the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Pursuant to that Declaration, the Convention was adopted by the General Assembly of the United Nations on 10 December 1984, and it came into force on 26 June 1987. Therefore, 26 June is now commemorated as the International Day in Support of Victims of Torture.

The objective of the Convention is to define torture, bind states to take effective measures against torture and establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, so that torture and other cruel, inhuman or degrading treatment or punishment may be prevented.

The Convention follows the basic structure of the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), with a Preamble and 33 articles, divided into three parts:

Part I (Articles 1–16) contains a definition of torture, and commits parties to taking effective measures to prevent any act of torture in any territory under their jurisdiction; these include ensuring that torture is a criminal offense under a party's municipal law; establishing jurisdiction over acts of torture committed by or against a party's nationals; ensuring that torture is an extraditable offense;

²⁷⁰ Article 2

²⁷¹ Article 3

establishing universal jurisdiction to try cases of torture where an alleged torturer cannot be extradited; parties must promptly investigate any allegation of torture; victims of torture, or their dependents in case victims died as a result of torture, must have an enforceable right to compensation; parties must also ban the use of evidence produced by torture in their courts and are barred from deporting, extraditing, or refouling people where there are substantial grounds for believing they will be tortured; parties are required to train and educate their law enforcement personnel, and must keep interrogation rules, instructions, methods, and practices under systematic review in order to prevent all acts of torture; and parties are also obliged to prevent all acts of cruel, inhuman, or degrading treatment or punishment in any territory under their jurisdiction.

Part II (Articles 17–24) governs reporting and monitoring of the Convention and the steps taken by the parties to implement it; it establishes the Committee against Torture and empowers it to investigate allegations of systematic torture; it also establishes an optional dispute-resolution mechanism between parties; and allows parties to recognize the competence of the Committee to hear complaints from individuals about violations of the Convention by a party.

Part III (Articles 25–33) governs ratification, entry into force, and amendment of the Convention and also includes an optional arbitration mechanism for disputes between parties.

2. Basic Principles

The following fundamental principles are declared in the Preamble of the Convention:

- (1) Equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;
- (2) All human rights derive from the inherent dignity of the human person;
- (3) It is the obligation of States to promote universal respect for, and observance of, human rights and fundamental freedoms; and
- (4) The struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world shall be made more effective.

3. Definition of Torture

The term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such

purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²⁷² However, this definition does not affect or prejudice any international instrument or national legislation, which does or may contain provisions of wider application.

4. Duties of the States

The Convention imposes the following duties on the State parties (parties to the Convention):

- 1) Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction;
- 2) No exceptional circumstances whatsoever, whether state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture;
- 3) An order from a superior officer or a public authority may not be invoked as a justification of torture;²⁷³
- 4) The State Party shall not expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture and for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights;²⁷⁴
- 5) Each State Party shall ensure that all acts of torture, including any attempt to commit torture and to an act by any person, which constitutes

²⁷² Article 1

²⁷³ Article 2

²⁷⁴ Article 3

complicity or participation in torture, are offences under its criminal law;

- 6) Each State Party shall make these offences punishable by appropriate penalties, which take into account their grave nature;²⁷⁵
 - 7) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases: when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) when the alleged offender is a national of that State if that State considers it appropriate;
 - 8) Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him under this Convention;
 - 9) Any State Party in whose territory a person alleged to have committed torture shall take him into custody or take other legal measures to ensure his presence. Such State shall immediately make a preliminary inquiry into the facts. Any person in such custody shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national and the relevant state shall be immediately notified the fact that such person is in custody and of the circumstances which warrant his detention and shall promptly report its findings to the said State and shall indicate whether it intends to exercise jurisdiction;²⁷⁶
 - 10) If the State Party does not extradite him, then it shall submit the case to its competent authorities for the purpose of prosecution. And any person, regarding whom proceedings are brought, shall be guaranteed fair treatment at all stages of the proceedings;²⁷⁷
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²⁷⁵ Article 4

²⁷⁶ Article 6

²⁷⁷ Article 7

- 11) The State parties shall make torture-related offences as extraditable offences in any extradition treaty existing between States parties. If a State party receives a request for extradition from another State party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences;²⁷⁸

- 12) States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences relating to torture;²⁷⁹
- 13) Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. And each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person;²⁸⁰
- 14) Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment, with a view to preventing any cases of torture;²⁸¹
- 15) Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed within its jurisdiction;²⁸²
- 16) Each State Party shall ensure that any individual who alleges he has been subjected to torture has the right to complain to, and to have his

²⁷⁸ Article 8

²⁷⁹ Article 9

²⁸⁰ Article 10

²⁸¹ Article 11

²⁸² Article 12

case promptly and impartially examined by, its competent authorities;²⁸³

- 17) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation;²⁸⁴
 - 18) Each State Party shall ensure that any statements, which have been made as a result of torture, shall not be invoked as evidence in any proceedings, except against a person accused of torture;²⁸⁵ and
 - 19) Each State Party shall undertake to prevent other acts of cruel, inhuman or degrading treatment or punishment, which do not amount to torture as defined earlier when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²⁸⁶
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5. Committee against Torture

A Committee against Torture (the Committee) shall be established under the Convention. The Committee shall consist of ten experts 'of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity'. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. The members of the Committee shall be elected for a term of four years.²⁸⁷

The Committee is one of UN-linked human rights treaty bodies. All State parties are obliged under the Convention to submit regular reports to the Committee on how rights are being implemented. Upon ratifying the

²⁸³ Article 13

²⁸⁴ Article 14

²⁸⁵ Article 15

²⁸⁶ Article 16

²⁸⁷ Article 17

Convention, States must submit a report within one year, after which they are obliged to report every four years. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of 'Concluding Observations'. Under certain circumstances, the Committee may consider complaints or communications from individuals claiming that their rights under the Convention have been violated. The Committee shall submit an annual report on its activities under the Convention to the States Parties and to the General Assembly of the United Nations.

6. Optional Protocol

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was adopted by the General Assembly on 18 December 2002, and it is in force since 22 June 2006. It provides for the establishment of 'a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment'. This system is to be overseen by a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, set up by the Committee.

Chapter Eleven

RIGHTS OF CHILD

1. Introduction

The international community progressed slowly down the path leading to the Convention on the Rights of the Child. The first legal step was taken in 1924, which the League of Nations endorsed the first Declaration of the Rights of the Child. The United Nations Charter (1945) also laid down much of the groundwork for the Convention by urging nations to promote and encourage respect for human rights and fundamental freedom 'for all'. Other early signs of a move to recognize and protect children's rights are evident in the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. The Universal Declaration states that 'all human beings are born free and equal in dignity and rights' and also stresses that 'motherhood and childhood are entitled to special care and protection' and refers to the family as 'the natural and fundamental group unit of society'.

Also, in 1948, the General Assembly adopted a second Declaration of the Rights of the Child, a brief, seven-point statement that built on the 1924 Declaration: 'By the present Declaration of the Rights of the Child... men and women of all nations, recognizing that Mankind owes to the child the best that it has to give, declare and accept it as their duty to meet this obligation in all respects...'. The 1948 Declaration was followed almost immediately by a decision to draft a still more detailed Declaration, resulting just over a decade later in a third Declaration of the Rights of the Child, adopted by the General Assembly in 1959.

The international legal framework was buttressed further in 1966 with the adoption of the two International Covenants - International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. These two Covenants became binding on State Parties as of 1976 when they entered into force and as such they provided a legal as well as moral obligation for countries to respect the human rights of each individual.

For child rights to carry the weight of international law, a ‘Convention’ or a ‘Covenant’ was required. Thus, in 1978, on the eve of the United Nations’ sponsored International Year of the Child, Poland formally proposed a draft text for the Convention on the Rights of the Child. The following year, the United Nations Commission on Human Rights formed a Working Group to review and expand on the original Polish text. The Working Group was made up of members of the United Nations (governments), non-governmental organizations (NGOs) and UN agencies. The Working Group drew heavily from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, in formulating what became the Convention on the Rights of the Child.

The UN General Assembly unanimously adopted the Convention on the Rights of the Child on 20th November 1989, and it entered into force or became legally binding on States Parties in September 1990. The same month, the world leaders at the World Summit for Children, held at the United Nations in New York, made a ‘solemn commitment’ to accord child rights a high priority.

The World Conference on Human Rights, held in Vienna in 1993, set the end of 1995 as a target for the universal ratification of the Convention. By the last day of the year, 185 State had ratified. The Convention reflects this global consensus and, in a very short period of time, it has become the most widely accepted human rights treaty ever. It has been ratified by 196 countries, making it the most widely ratified international human rights treaty in history and as of today, only one country have yet to ratify the landmark treaty, the United States of America.

The Convention on the rights of the Child, normally called CRC, reflects a new vision of the child. Children are neither the property of their parents nor are they helpless objects of charity. They are human beings and are the subject of their own rights. The Convention offers the vision of the child as an individual and as a member of a family and community, with rights and responsibilities appropriate to his or her age and stage of development.

Children living in poor developing countries have the same rights as children living in wealthy developed countries. The Convention places equal emphasis on all of the rights of the children. There is no such thing as a ‘small’ right and no hierarchy of human rights. All the rights enumerated in the Convention – the civil and political rights as well as the economic, social and cultural rights – are indivisible and interrelated, with a focus on the child as a whole.

The Convention on the Rights of Child outlines, in its first 41 articles, the human rights to be respected and protected for every child under the age of 18 years and requires that these rights be implemented in the light of the Convention’s guiding principles. Articles 42-45 cover the obligation of the States Parties to disseminate the CRC, the implementation of the Convention and monitoring of progress towards the realization of child rights through State Parties’ obligations and the reporting responsibilities of State Parties. The final Clauses (Articles 46-54) cover the processes of accession and ratification by State Parties, the Convention’s entry into force and the depositary function of the Secretary General of the United Nations. In May 2000, two Optional Protocols to the Convention were adopted by the General Assembly.

2. Guiding Principles

The underlying values or guiding principles of the Convention guide the way each right is to be fulfilled and respected and serve as a constant reference for the implementation and monitoring of children’s rights. The Convention’s four guiding principles are as follows:

- 1) Non-discrimination (Article 2);
- 2) Best interest of the child (Article 3);
- 3) Survival and development (Article 6); and
- 4) Participation (Article 12).

Similarly, the Preamble of the Convention recognizes the following fundamental principles, which could be used as an aid to the interpretation of the Convention:

- 1) Recognition of the inherent dignity and of the equal and inalienable rights of all members of the Human family is the foundation of freedom, justice and peace in the world;
- 2) The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding;
- 3) The child should be fully prepared to live an individual life in the Society, and brought up in the spirit of the ideal proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity;
- 4) The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth; and
- 5) The traditions and cultural values of each People have importance for the protection and harmonious development of the child.

3. Definition of Child

The CRC defines as children all human beings under the age of 18, unless the relevant national laws recognize an earlier age of majority. The Convention emphasizes that States substituting an earlier age for specific purposes must do so in the context of the Convention's guiding principles.

While in some cases, States are simply obliged to be consistent in setting benchmark ages, for example, in defining the age for admission to employment or for completion of compulsory education, in other cases, the Convention sets a clear upper benchmark:

- 1) Capital punishment or life imprisonment without the possibility of release is explicitly prohibited for those under age of 18 years (Article 37);
- 2) While recruitment into the armed forces or direct participation in hostilities is expressly prohibited for those under age 15 according to Article 38 of the Convention, an 'Optional Protocol to the Convention on the Involvement of Children in Armed Conflict' was adopted by the

General Assembly on 25th May 2000, which raises to 18 years the age of participation in hostilities and forced recruitment of children into armed forces; and

- 3) States are also free to refer in national legislation to ages over 18 as the upper benchmark in defining the child. In such instances and others, where national or international law sets child rights standards that are higher than those in the Convention on the Rights of the Child, the higher standards always prevail (Article 41).

4. Rights guaranteed

The Convention guarantee, the following forty rights:

- 1) No discrimination (Article 2)
- 2) Best interest of the child (Article 3)
- 3) Economic and social rights (Article 4)
- 4) Rights of parents (Article 5)
- 5) Survival and development (Article 6)
- 6) Rights and registration (Article 7)
- 7) Right to identify (Article 8)
- 8) No separation from parents (Article 9)
- 9) Right of re-union (Article 10)
- 10) Prevention from illicit transfer (Article 11)
- 11) Right of participation (Article 12)
- 12) Freedom of expression (Article 13)
- 13) Freedom of conscience (Article 14)
- 14) Freedom of association and assembly (Article 15)
- 15) Right to privacy and family (Article 16)
- 16) Right to information (Article 17)

- 17) Common responsibilities of the parents (Article 18)
- 18) Protection against violence (Article 19)
- 19) Special protection (Article 20)
- 20) Adoption (Article 21)
- 21) Rights of refugee (Article 22)
- 22) Rights of the disabled (Article 23)
- 23) Health rights (Article 24)
- 24) Periodic review of treatment (Article 25)
- 25) Social security (Article 26)
- 26) Adequate standard of living (Article 27)
- 27) Rights to education (Article 28)
- 28) Rights to purposive education (Article 29)
- 29) Rights of minority child (Article 30)
- 30) Right to rest and leisure (Article 31)
- 31) Protection from economic exploitation (Article 32)
- 32) Protection from drugs (Article 33)
- 33) Protection from sexual exploitation (Article 34)
- 34) Protection from sexual exploitation (Article 35)
- 35) Protection from abduction and sale (Article 36)
- 36) Protection from inhuman treatment (Article 37)
- 37) Protection in armed conflicts (Article 38)
- 38) Recovery and reintegration (Article 39)
- 39) Protection of law (Article 40)
- 40) Protection of conductive rights (Article 41)

1) No Discrimination

The governments are obliged to respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion political or other opinion, national, ethnic or social origin, property, disability, birth or other status. They shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinion, or beliefs of the child's parents, legal guardians, or family members (Article 2).

2) Best interest of Child

'The best interest of the child' shall be the primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. The governments shall have to take all appropriate legislative and administrative measures to ensure the child such protection and care as is necessary for his or her well-being. The governments have to ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities (Article 3).

3) Economic and Social Rights

The Convention directs States Parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present for the implementation of the rights recognized in the present convention. With regard to economic, social and cultural rights the States Parties have to undertake such measures to the maximum extent of their available resources and, where needed, within framework of international cooperation (Article 4).

4) Rights of Parents

The Convention respects the responsibilities, rights and duties of parents, or the members of the extended family or community, legal

guardians or other persons legally responsible for the child (where applicable), as provided for by local custom, to provide an appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. These rights and duties should be in a manner consistent with the evolving capacities of the child (Article 5).

5) Survival and Development

Every child has the inherent right to life. The States Parties have to ensure to the maximum extent possible the survival and development of the child (Article 6).

6) Name and Registration

Every child has the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. Every child shall be registered immediately after birth. The States Parties have to ensure the implementation of these rights in accordance with their national laws and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be refugee or stateless (Article 7).

7) Right to Identity

Every child has right to preserve his or her identity, including nationality, name and family relations, as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity (Article 8).

8) No separation from parents

The child shall not be separated from his or her parents against their will. The competent authorities can determine, in accordance with applicable laws and procedures, that such separation is necessary for the best interests of the child. This determination by the authorities should be subject to judicial review by the competent courts. In any proceedings where the competent

authorities are determining the separation, all interested Parties shall be given an opportunity to participate in the proceedings and make their views known.

The States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis. Where such separation results from any action initiated by a State Party, such as detention, imprisonment, exile, deportation or death of one or both parents of the child, it shall, upon request provide the parents, the child or another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family (Article 9).

9) Right of re-union

Every child or parents have right to enter or leave a State Party for the purpose of family reunification and the State Party shall deal with such application in a positive, humane and expeditious manner. The States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family. Furthermore, a child whose parents reside in different States shall have the right to maintain on a regular basis, personal relations and direct contacts with both parents. The States Parties shall respect the right of the child and his or her parents to leave any country for contract. The right to leave any country shall be subject only to such restrictions as are prescribed by law of the land and which are necessary to protect the national security, public order public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention (Article 10).

10) Prevention from illicit transfer

The States Parties shall take measures to combat the illicit transfer and non-return of children abroad. For this purpose, the States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements (Article 11).

11) Right of participation

The States Parties shall assure to the child, who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child. The views of the child should be given due weight in accordance with the age and maturity of the child. The child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body (Article 12).

12) Freedom of expression

Every child has the right to freedom of expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others or for the protection of national security or of public order, or of public health or morals (Article 13).

13) Freedom of conscience

Every child has right to freedom of thought, conscience and religion. However, the parents and when applicable legal guardians have right to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. These rights can be subject only to such limitations as are prescribed by Law and are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others (Article 14).

14) Freedom of association and assembly

Every child has right to freedom of association and to freedom of peaceful assembly. Nobody can impose restrictions on the exercise of these rights other than those imposed in conformity with the Law and which are necessary in a democratic society in the interests of national security, public

safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others (Article 15).

15) Right to privacy and family

Every child has right to privacy, family home or free correspondence. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or to unlawful attacks on his or her honour and reputation (Article 16).

16) Right to information

The child has right to access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. For this purpose, States Parties shall encourage the mass media to disseminate information and material of social and cultural benefits to the child. There should be international cooperation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources. Production and dissemination of children's books should be encouraged. The State should encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being (Article 17).

17) Common responsibilities of parents

Both the parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. The States Parties shall render appropriate assistance to parents and legal guardians in the performance of their childrearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. They shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible (Article 18).

18) Protection against violence

The child has to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents(s), legal guardian(s) or any other person who has the care of the child. The States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child. Such protective measures should include effective procedures for the establishment of social programmes to provide necessary support for the child and of those who have the care of the child and for identification, reporting, referral, investigation, treatment and following up of instances of child maltreatment, and, as appropriate, for judicial involvement (Article 19).

19) Special protection

The child who is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in the environment, is entitled to special protection and assistance provided by the State that should ensure alternative care for such a child. Such care could include, *inter alia*, foster placement, *Kafalah* of Islamic Law adoption or, if necessary, placement in suitable institution for the care of children. When considering solutions, due regard shall be paid to the child's ethnic, religious, cultural and linguistic background (Article 20).

20) Adoption

The States Parties recognize and/or permit the system of adoption shall ensure that the best interest of the child shall be the paramount consideration in the adoption. They shall ensure that the adoption of a child is authorized only by competent authority that shall determine in accordance with applicable law and reliable and relevant information. They should also ensure that the child by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption and the placement does not result in improper financial gain for those involved in it (Article 21).

21) Rights of refugee

The child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law, shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights under the Law. The States Parties shall provide cooperation in any efforts by the United Nations or other organization(s) to protect and assist such a child (Article 22).

22) Rights of the disabled

The mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitates the child's active participation in the community. They have right to appropriate special care to be provided by the State.

The States Parties shall promote the exchange of appropriate information in the fields of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experiences in these areas. In this regard, particular account shall be taken of the needs of developing countries (Article 23).

23) Health rights

The child has right to the enjoyment of the highest attainable standards of health and to facilities for the treatment of illness and rehabilitation of health. The State shall take appropriate measures: (a) to diminish infant and child mortality; (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) to combat disease and malnutrition; (d) to ensure appropriate pre-natal and post-natal health care for mothers; (e) to ensure that parents have basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; (f) to develop preventive health care, guidance for parents, and

family planning education and services; and (g) to abolish traditional practices prejudicial to the health of children (Article 24).

24) Periodic review of treatment

The child, who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, has a right to a periodic review of the treatment and all other circumstances relevant to his or her placement (Article 25).

25) Social security

Every child has the right to benefit from social security, including social insurance and State shall take the necessary measures to achieve the full realization of this right in accordance with their national Law. The benefits should be granted, taking into account the resources and the circumstances of the child and person having responsibility for the maintenance of the child, as well as other relevant considerations (Article 26).

26) Adequate standard of living

Every child has right to a standard of living adequate for his physical, mental, spiritual, moral and social development. The parent(s) or other(s) responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. The State in accordance with means, shall take appropriate measures to assist parents and others responsible for the child to implement this right. The State shall also take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both, within the State and from abroad (Article 27).

27) Right to education

The child has right to education and the State, with a view to achieving this right progressively and on the basis of equal opportunity, shall: (a) make primary education compulsory and available free to all; (b) encourage the

development of different forms of secondary education including general and vocational education; (c) make educational and vocational information and guidance available and accessible to all children; (d) take measures to encourage regular attendance at school and the reduction of dropout rates; and (e) take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the Convention.

28) Right to purposive education

The child has a right not only to education but to a meaningful education which shall be directed to: (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living and the country from which he or she may originate, and for civilizations different from his or her own; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all people, ethnic, national and religious groups and persons of indigenous origin; and (e) the development of respect for the natural environment (Article 29).

29) Rights of minority child

The child belonging to ethnic, religious or linguistic minorities or persons of indigenous origin shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language (Article 30).

30) Right to rest and leisure

The child has right to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate

freely in cultural life and the arts. The State shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity (Article 31).

31) Protection from economic exploitation

The child has a right to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. For this purpose, the State Party shall take legislative, administrative, social and educational measures to provide for: (a) a minimum age or minimum wages for admission to employment; (b) appropriate regulation of the hours and conditions of employment; (c) appropriate penalties or other sanctions to ensure these measures (Article 32).

32) Protection from drugs

The States Parties are obliged to take all appropriate measures, including legislative, administrative, social and educational, to protect children from illicit use of narcotic drugs and psychotropic substances as defined in the relevant international Treaties, and to prevent the use of children in the illicit production and trafficking of such substances (Article 33).

33) Protection from sexual exploitation

The child has a right of protection from all forms of sexual exploitation and sexual abuse. For this purpose, the States Parties shall have to take all appropriate national, bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials (Article 34).

34) Protection from abduction and sale

The States Parties are bound to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of, or trafficking in, children for any purpose or in any form (Article 35).

35) Protection from exploitation

The child has a right of protection against all other forms of exploitation prejudicial to any aspects of the child's welfare (Article 36).

36) Protection from inhuman treatment

Every child has right to be protected from torture or other cruel, inhuman or degrading treatment or punishment. Capital punishment or life imprisonment without possibility of release cannot be imposed for offences committed by the child.

The child cannot be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the Law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

Every child deprived of liberty should be treated with humanity and in a manner, which takes into account the needs of persons of his or her age. Every child deprived of liberty should be separated from adults unless it is considered in the child's best interest not to do so. The child shall have the right to maintain contact with his or her family.

Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before an independent court or impartial authority (Article 37).

37) Protection in armed conflicts

The rules of International Humanitarian Law applicable to the children in armed conflicts should be respected. The children who have not attained the age of fifteen years cannot take a direct part in hostilities. Any child who

has not attained the age of fifteen years cannot be recruited into the armed forces (Article 38).

38) Recovery and reintegration

It is the duty of State to take all appropriate measures to promoted physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, abuse, torture or any other form of cruel inhuman or degrading treatment or punishment or armed conflicts. Such recovery and reintegration shall take place in an environment, which fosters health, self-respect and dignity of child (Article 39).

39) Protection of law

Every child alleged as accused of or recognized as having infringed the Penal Law has a right to be treated in a manner consistent with the promotion of the child's sense of dignity and which takes into account the child's age and the desirability of promoting the child's reintegration in society.

Every such child shall: (i) be presumed innocent until proven guilty according to law; (ii) be informed promptly the charges against him or her, and to have legal or other appropriate assistance in the preparation of his or her defence; (iii) have right that the matter be determined without delay by a competent and independent judicial body in a fair hearing according to Law; (iv) not be compelled to give testimony or to confess guilt; (v) have right to an appeal to higher competent, independent and impartial authority or judicial body according to Law; and (vi) have free assistance of an interpreter if the child cannot understand or speak the language used.

A variety of dispositions, such as care, guidance and supersession orders, counselling, probation, foster care, education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate, both to their circumstances and the offence (Article 40).

40) Protection of conducive rights

These rights enshrined in the Convention shall not affect any provisions which are more conducive to the realization of the rights of child and which may be International Law in force for that state 41.

5. CRC Protocols

1) Optional Protocol on the Involvement of Children in Armed Conflict

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (First Protocol: OP1), is also known as the child soldier treaty. The United Nations General Assembly adopted the treaty as a supplementary protocol to the Convention on the Rights of the Child by resolution 54/263 on 25th May 2000. The protocol came into force on 12th February 2002. As of September 2018, 168 states are party to the protocol and a further 13 states have signed but not ratified it.

Under this Protocol states agree to:

- 1) Prohibit the conscription into the military of children under the age of 18;
- 2) Ensure that military recruits are no younger than 16;
- 3) Prevent recruits aged 16 or 17 from taking a direct part in hostilities; and
- 4) The Protocol also forbids non-state armed groups from recruiting anyone under the age of 18 for any purpose.

2) Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (Second Protocol:OP2) is a protocol to the Convention on the Rights of the Child and requires parties to prohibit the sale of children, child prostitution and child pornography.

The Protocol was adopted by the UN General Assembly in 2000 and entered into force on 18th January 2002. As of September 2018, 175 states are party to the protocol and another nine states have signed but not ratified it.

According to the preamble, the Protocol is intended to achieve the purposes of certain articles in the Convention on the Rights of the Child, where the rights are

defined with the provision that parties should take ‘appropriate measures’ to protect them. Article 1 of the protocol requires parties to protect the rights and interests of child victims of human trafficking, child prostitution and child pornography.

The Protocol requires parties to prohibit the sale of children, child prostitution and child pornography. It also obliges parties to pass laws within their own territories against these practices ‘punishable by appropriate penalties that take into account their grave nature’.

The Protocol also outlines the standards for international law enforcement covering diverse issues such as jurisdictional factors, extradition, mutual assistance in investigations, criminal or extradition proceedings and seizure and confiscation of assets as well.

3) Optional Protocol to the Convention on the Rights of the Child on a communications procedure

The Optional Protocol to the Convention on the Rights of the Child on a communications procedure (Third Protocol:OP3) was adopted and opened for signature, ratification and accession by General Assembly on 19th December 2011, and it entered into force on 14th April 2014.

By this Protocol a State Party recognizes the competence of the CRC Committee and the Committee shall not exercise its competence regarding a State Party to the present Protocol on matters concerning violations of rights set forth in an instrument to which that State is not a party. Furthermore, the Committee shall receive no communication if it concerns a State that is not a party to the present Protocol.

The Committee shall adopt rules of procedure to be followed when exercising the functions conferred on it by the present Protocol. The Protocol lays down a communication procedure and enquiry procedure.

Communications may be submitted by or on behalf of an individual or group of individuals, within the jurisdiction of a State Party, claiming to be victims of a violation by that State Party of any of the rights set forth in CRC and first two Protocols.

The Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary. The Committee may bring any admissible communication confidentially to the attention of the State Party concerned and the State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have provided. The Committee shall make available its good offices to the parties with a view to reaching a friendly settlement of the matter.

The Committee shall consider communications received under the present Protocol and after examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

A State Party to the present Protocol may, at any time, declare that it recognizes the competence of the Committee to receive complaints made by a state.

6. CRC Committee

The Committee on the Rights of the Child (CRC) is the body of 18 independent experts that monitors implementation of the CRC by its States Parties. It also monitors implementation of two Optional Protocols to the Convention, on Involvement of children in armed conflict and on Sale of children, child prostitution and child pornography.

On 19th December 2011, the UN General Assembly approved a third Optional Protocol on a communication procedure, which allows individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. The Protocol entered into force in April 2014.

All States Parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must submit an initial report two years after acceding to the Convention and then periodic reports every five years. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of ‘Concluding Observations’.

The Committee also reviews the initial reports, which must be submitted by States who have acceded to the first two Optional Protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography.

The Committee is also able to consider individual complaints alleging

violations of the CRC and its first two optional protocols by States Parties to the third Protocol, as well as to carry out inquiries into allegations of grave or systematic violations of rights under the Convention and its two optional protocols.

The Committee meets in Geneva and normally holds three sessions per year consisting of a three-week plenary and a one-week pre-sessional working group. In 2010, the Committee considered reports in two parallel chambers of 9 members each, ‘as an exceptional and temporary measure’, in order to clear the backlog of reports.

The Committee also publishes its interpretation of the content of human rights provisions, known as General Comments on thematic issues and organizes days of general discussion.²⁸⁸

²⁸⁸ <https://www.ohchr.org/en/hrbodies/crc/pages/crcintro.aspx>

Chapter Twelve

PROTECTION OF MIGRANT WORKERS

1. Introduction

The concept of the migrant workers encompasses a wide range of persons and situations. Migration is a drive, a possibility, a solution, an adventure, a phenomenon that can almost be said to be inherent in the human nature. People have been migrating since the beginning of times, and this has led to the development of societies and individuals, as well as to collective and personal tragedies. Migration for work, understood as migration in order to make a living, is as ancient as migration. International migration is, by definition, a concept that has existed since the creation of national States, thus a phenomenon that has evolved, and continues to adapt its nature, as a consequence of other human constructions. Where there are States and there is international migration, international migrants will end up as aliens, non-nationals, in the States they enter, unless they attain a new citizenship.

Migration is indeed recognized as a positive force, having contributed to the global economic growth as well as to the evolution of societies and the enrichment of cultures.²⁸⁹ The International Labour Organization estimated in 2017 that there were 258 million international migrants worldwide²⁹⁰ who were outside their home country for at least 12 months and approximately half of them were estimated to be economically active i.e., being employed or seeking employment.²⁹¹ More than 164 million people, including refugees, asylum-seekers, permanent immigrants and others, live and work in a country other than that of their birth or citizenship. Many of them are migrant workers.

A migrant worker is a person who either migrates within their home country or outside it to pursue work such as seasonal work. Migrant workers usually do not have an intention to stay permanently in the country or region in which they work. Migrant workers who work outside their home country may also be called foreign workers or expatriates, especially when they are sent for or invited to work in the host country before leaving the home country.

²⁸⁹ Global Commission on International Migration. *Report of the Global Commission on International Migration, Migration in an Interconnected World: New Directions for Action* (GCIM, Switzerland, 2005) p. 5.

²⁹⁰ <https://www.ilo.org/global/topics/labour-migration/lang--en/index.htm>

²⁹¹ <https://www2.ohchr.org/english/bodies/cmw/faqs.htm>

2. Migrant Workers' Convention, 1990

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990²⁹² (the Convention) is a United Nations multilateral treaty governing the protection of migrant workers and their families. The primary objective of the Convention is to foster respect for migrants' human rights. Migrants are not only workers, they are also human beings. The Convention does not create new rights for migrants but aims at guaranteeing equality of treatment, and the same working conditions, including in case of temporary work, for migrants and nationals. The Convention relies on the fundamental notion that all migrants should have access to a minimum degree of protection.

The Convention recognizes that regular migrants have the legitimacy to claim more rights than irregular immigrants, but it stresses those irregular migrants must see their fundamental human rights respected, like all human beings. The Convention breaks new ground in defining those rights which apply to certain categories of migrant workers and their families, including frontier workers, seasonal workers, seafarers, workers on offshore installations, itinerant workers, migrants employed for a specific project and self-employed workers.

The Convention proposes that actions be taken to eradicate clandestine movements, activities based on misleading information inciting people to migrate irregularly and through sanctions against traffickers and employers of undocumented migrants.

The Convention under Article 2, paragraph 1, defines migrant worker as 'a person who is to be engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'.²⁹³ The rights of migrant workers as established by the Convention are divided into two general categories i.e.

- (a) the rights of migrant workers and members of their family, applicable to all migrant workers, including the illegal ones; and
- (b) specific rights of migrant workers and members of their family, applicable only to migrant workers in a regular situation.²⁹⁴

3. Rights for all migrant workers

- (1) Non-discrimination: The Convention, under Article 1(1) prohibits any form of discrimination and it is applicable 'to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language,

²⁹² The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 is referred as 'CMW' in footnotes.

²⁹³ Article 2 of CMW

²⁹⁴ <https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx>

religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.²⁹⁵

This right is also provided under Articles 7 and 23 of the Universal Declaration of Human Rights, 1948 (UDHR), Articles 2 and 3 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD), Articles 4, 20, 24 and 26 of the International Covenant on Civil and Political Rights, 1996 (ICCPR) and Articles 2 and 10 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).

The States Parties are required to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction, the rights provided for in the Convention without distinction of any kind and in accordance with the international instruments concerning human rights.²⁹⁶

- (2) Freedom of movement: The Convention applies during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.²⁹⁷

Migrant workers and members of their families have right to leave any State, including their State of origin. This right shall not be subjected to any restrictions except those that are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the Convention.²⁹⁸ Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.²⁹⁹

Freedom of movement, mobility rights, or right to travel is a human rights concept encompassing the right of individuals to travel from place to place within the territory of a country, and to leave the country and return to it. The right includes not only visiting places, but changing the place where the individual resides or works.

²⁹⁵ Article 1(1) of CMW

²⁹⁶ Article 7 of CMW

²⁹⁷ Article 1(2) of CMW

²⁹⁸ Article 8(1) of CMW

²⁹⁹ Article 8(2) of CMW

Similar rights are provided under Article 13 of the UDHR that asserts a) everyone has the right to freedom of movement and residence within the borders of each state; and b) everyone has the right to leave any country, including his own, and to return to his country. This right is also provided under Article 5 of the ICERD and Article 12 of the ICCPR.

- (3) **Right to life:** Article 9 of the Convention provides that ‘the right to life of migrant workers and members of their families shall be protected by law.’³⁰⁰ The right to life is a universal moral principle that stands at the foundation of the concept of human rights. Historically, the right to life has been expressed in a variety of ways - such as the primacy of the human person, or the intrinsic dignity of the human being. Some trace the origin of ‘the right to life’ to the early middle-ages while other more ancient expressions express the protection of life in the negative - forbidding harming or killing people - such as the Ten Commandments (Prophet Moses) and the Hippocratic tradition in medicine (Hippocrates, c. 460 – c. 370 BC).

The modern statements of the right to life stress that it is an integral right - it does not allow distinctions between races, sexes, or people of different capabilities. This notion was felt keenly at the time when the United Nations drew up its Universal Declaration of Human Rights in the wake of the Second World War and the memory of the holocaust in which millions were exterminated on the pretext that they were a threat to others, and that they were less than human.³⁰¹

The right to life is enshrined in Article 3 of the UDHR that provides that ‘everyone has the right to life, liberty and security of person. The right to life is reiterated in a number of human rights treaties including Article 6 of ICCPR, Article 6 of the Convention on the Rights of the Child, 1989 (CRC) and Article 10 of the Convention on the Rights of Persons with Disabilities (CRPD).³⁰²

- (4) **Right to protection against cruel, inhuman or degrading treatment:** Article 10 of the Convention provides that ‘no migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’³⁰³ A cardinal axiom of international human rights law is that the prohibition against torture, cruel, inhuman and degrading treatment is absolute in

³⁰⁰ Article 9 of CMW

³⁰¹ <https://www.spuc.org.uk/abortion/right-to-life>

³⁰² http://www.claiminghumanrights.org/right_to_life_definition.html

³⁰³ Article 10 of CMW

the sense that no exception can be accepted, defended, justified, or tolerated in any circumstance whatever.

The right to life is reiterated in a number of human rights treaties including Article 5 of the UDHR and Article 7 of the ICCPR. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT) also aims to prevent, around the world, torture and other acts of cruel, inhuman, or degrading treatment or punishment. The CAT provides that ‘no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’³⁰⁴ The Convention requires states to take effective measures to prevent torture in any territory under their jurisdiction, and forbids states to transport people to any country where there is reason to believe they will be tortured.

- (5) Protection against slavery, servitude and forced labour: Article 11 of the Convention provides that no migrant worker or member of his or her family shall be held in slavery or servitude³⁰⁵ and no migrant worker or member of his or her family shall be required to perform forced or compulsory labour.³⁰⁶ However, imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.

The term ‘forced or compulsory labour’ does not include:

- (a) Any work or service normally required of a person who is under detention in consequence of a lawful order of a court or of a person during conditional release from such detention;
- (b) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (c) Any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the State concerned.³⁰⁷

The right to freedom from slavery prohibits people being held in conditions in which the powers attaching to the right of ownership are exercised. The right to freedom from forced labour requires that a person be free from work or service that is compelled under the threat of penalty and which the person has not offered to

³⁰⁴ Article 2 of Convention Against Torture

³⁰⁵ Article 11(1) of CMW

³⁰⁶ Article 11(2) of CMW

³⁰⁷ <https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx>

perform voluntarily. The right to freedom from slavery and forced labour is contained in Article 8 of the ICCPR and Article 27 the CRPD.

Slavery: The prohibition against slavery has long been recognized as a crime under international law from which no exception is permitted. Slavery has been defined in the International Convention to Suppress the Slave Trade and Slavery of 1926 as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’³⁰⁸ Slavery is also dealt with in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, which expands the definition of slavery to encompass slavery-like practices including debt bondage, serfdom, forced marriage and certain instances of child exploitation.³⁰⁹

Forced labour: International Labour Organization (ILO) Convention No. 29 on the abolition of forced labour provides that ‘the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’³¹⁰ ‘Work’ includes all kinds of work or service, not just physical work. Globally, men, women and children have been used as forced labour in construction, mining, fishing, forestry, agriculture and hospitality. Other work includes domestic and sweatshop labour, sex work, street begging and forced recruitment into militias or armed forces.

Debt bondage: Debt bondage is defined by Article 1(2) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery as the status or condition arising from a pledge by a debtor of their personal services, or those of a person under their control, as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Human trafficking: The term ‘human trafficking’ has the same meaning as the terms ‘trafficking in persons’ and ‘people trafficking’. The practice of human trafficking often includes an element of contravention of the right to freedom from slavery and forced labour. The United Nations Convention against Transnational Organized Crime (UNTOC) and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol) require parties to create offences in relation to the recruitment or transfer of persons by threat or use of force or by other forms of coercion, fraud, deception,

³⁰⁸ Article 1(1) of Slavery Convention, 1926

³⁰⁹ Article 1 of Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956

³¹⁰ Article 2(1) of Forced Labour Convention, 1930

the abuse of power, abuse of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.³¹¹

(6) Freedom of thought, conscience and religion: Article 12 of the Convention provides that migrant workers and members of their families:

- (a) Shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private, to manifest their religion or belief in worship, observance, practice and teaching;
- (b) Shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice;
- (c) May exercise religion or belief, that may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;
- (d) Shall have right to ensure the religious and moral education of their children in conformity with their own convictions.

Such ideas are also a vital part of international human rights law. Article 19 of the UDHR guarantees that ‘everyone has the right to freedom of opinion and expression.’ This right includes freedom to hold opinions without interference.³¹² Article 18 of the ICCPR explains ‘freedom of thought’ as ‘everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.’

(7) Right of expression and opinion: Article 13 of the Convention provides that migrant workers and members of their families shall have the right to hold opinions without interference. They have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.

The exercise of this right provided for carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

³¹¹ Article 3 of UNTOC

³¹² <http://fra.europa.eu/en/charterpedia/article/10-freedom-thought-conscience-and-religion>

- (a) For respect of the rights or reputation of others;
- (b) For the protection of the national security of the States concerned or of public order or of public health or morals;
- (c) For the purpose of preventing any propaganda for war; and
- (d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.³¹³

The right to freedom of opinion and expression is a complex right that includes the right to seek, receive and impart information and ideas of all kinds and through whatever medium. This means, *inter alia*, that when an individual's right to freedom of expression is unlawfully restricted, the right of others to 'receive' information and ideas is also violated.³¹⁴

Article 13 of the Conventions protects the right to hold one's own opinions and to express them freely without government interference. This includes the right to express your views aloud (for example through public protest and demonstrations) or through:

- (a) Published articles, books or leaflets;
- (b) Television or radio broadcasting;
- (c) Works of art; and
- (d) Internet and social media.

Freedom of speech is a principle that supports the freedom of an individual or a community to articulate their opinions and ideas without fear of retaliation, censorship, or legal sanction. The term 'freedom of expression' is sometimes used synonymously but includes any act of seeking, receiving, and imparting information or ideas, regardless of the medium used.

Freedom of speech and expression may not be recognized as being absolute, and common limitations to freedom of speech relate to libel, slander, obscenity, pornography, sedition, incitement, fighting words, classified information, copyright violation, trade secrets, food labelling, non-disclosure agreements, the right to privacy, the right to be forgotten, public security, and perjury. Justifications for such include the harm principle, proposed by John Stuart Mill in *On Liberty*, which suggests that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.

³¹³ Article 13 of the CMW

³¹⁴ <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-freedom-of-opinion-and-expression/what-is-freedom-of-opinion-and-expression>

Freedom of expression is recognized as a human right under Article 19 of the UDHR and Articles 19 and 25 of the ICCPR. Article 19 of the UDHR states that ‘everyone shall have the right to hold opinions without interference’ and ‘everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’

- (8) Respect of honour, of dignity and of privacy: Article 14 of the Convention fully protects the honour, dignity and privacy of migrant workers and their families by providing that that ‘no migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.’

Privacy is a fundamental human right recognized in the UDHR, the ICCPR and in many other international and regional treaties. Article 12 of the UDHR provides that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, unlawful attacks on his honour and reputation.

Everyone has worth and dignity as a human being, whether they are young or old, rich or poor, male or female, or any other difference. This is why one should treat others with honor, dignity, and courtesy instead of bullying, harassing, or manipulating in order to get what you want. The most common response people offer is that dignity is about respect. To the contrary, dignity is not the same as respect. Dignity is the inherent value and worth as human beings; everyone is born with it. Respect, on the other hand, is earned through one’s actions.

Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age. Nearly every country in the world recognizes a right of privacy explicitly in their Constitution. At a minimum, these provisions include rights of inviolability of the home and secrecy of communications. Most recently-written Constitutions such as South Africa’s and Hungary’s include specific rights to access and control one’s personal information. In the early 1970s, countries began adopting broad laws intended to protect individual privacy.

- (9) Right to own property: Article 15 of the Convention provides migrant workers right to own property. It says that ‘no migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.’

Article 17 of the UDHR enshrines the right to property stating that ‘everyone has the right to own property alone as well as in association with others and no one shall be arbitrarily deprived of his property.’³¹⁵

- (10) Right to due process: Article 16 of the Convention emphasizes the need to ensure due process for migrant workers and members of their families. Investigations, arrests and detentions are to be carried out in accordance with established procedures.³¹⁶ Migrant workers and members of their families shall have the right to liberty and security of person. When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:

- (a) Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law;
- (b) They shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law;
- (c) They shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them; and
- (d) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefore;

³¹⁵ Article 17(2) of UDHR

³¹⁶ Articles 16 to 20 of CMW

- (e) Those who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity;³¹⁷ and
- (f) Those who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.

(11) Prohibition of arbitrary expulsion: Article 22 of the Convention prohibits arbitrary expulsion of migrant workers. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

Expulsion, or permanent exclusion, refers to the removal or banning of a worker from an institution due to persistent violation of that institution's rules, or in extreme cases, for a single offense of marked severity. Laws and procedures regarding expulsion vary between countries and states.

According to the European Court of Human Rights, collective expulsion is any measure compelling non-nationals, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-national of the group.³¹⁸

(12) Equality with nationals: Migrant workers are to be treated as equal to the nationals of the host country in respect of remuneration and conditions of work, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of work contract, minimum age, restrictions on homework, etc. (Article 25). Equality with nationals extends also to social security benefits (Article 27), emergency medical care (Article 28) and birth registration (Article 29).

With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. (Article 27)

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care

³¹⁷ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en

³¹⁸ *Andric v. Sweden*, Decision of 23 February 1999, Appl. No. 45917/99, para.1 [Eur.Ct.H.R.]

shall not be refused to them by reason of any irregularity with regard to stay or employment. (Article 28)

Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality. (Article 29) Apart from these rights migrant worker has also the right to education. (Article 30)

(13) Transfer of earnings: On completion of their term of employment, migrant workers have the right to transfer their earnings and savings as well as their personal effects and belongings (Article 32).

(14) Right to information: They have the right to be informed by the States concerned about their rights arising from the present Convention as well as the conditions of their admission, and their rights and obligations in those States. Such information should be made available to migrant workers free of charge and in a language understood by them (Article 33).

4. Rights for Migrant Workers in a Regular Situation

In addition to the aforesaid general rights to all migrant workers (regular as well as irregular) and their families, there are other rights specifically available to regular migrant workers, holding resident or work permits.

(1) Right to be fully informed: A migrant worker has right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.³¹⁹

This right is also envisaged in Article 19 of the UDHR, Article 19 of the ICCPR, Article 10 of the European Convention on Human Rights (ECHR), Article 9 of African Charter on Human and Peoples' Rights and in Article 13 of American Convention on Human Rights.

(2) Right to be temporarily absent: A migrant worker or his family has right to be temporarily absent³²⁰ without effect upon their authorization to stay or to work. Under the Convention, States of employment are required to authorize migrant

³¹⁹ Article 37 of CMW

³²⁰ A migrant worker is called 'temporary absent', when s/he leaves the country of migration during the term of his migration.

workers and members of the families to be temporarily absent without effect upon their authorization to stay or to work, as the case may be. In doing so, States of employment shall take into account the special needs and obligations of migrant workers and members of their families, in particular in their States of origin.³²¹

- (3) Right to movement without restrictions: A migrant worker or his family has right to liberty of movement in the territory of the State of employment and freedom to choose their residence there. This right shall not be subjected to any restrictions unless provided under law.³²²

This right is provided under Article 13 of the UDHR, Article 12 of the ICCPR, Protocol 4 Article 2 of the ECHR, Article 10 of the CRC, Articles 9 and 18 of the CRPD and Article 12 of the African Charter on Human and Peoples' Rights.

- (4) Freedom of Association: A migrant worker or his family under regular situation has right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.³²³

This right is also enshrined in Article 20 of the UDHR, Article 21 of the ICCPR, Article 15 of the CRC, Article 11 of the ECHR and Articles 10 and 11 of the African Charter on Human and Peoples' Rights.

- (5) Right to participate in public affairs: A migrant worker or his family under regular situation has right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State. The State is responsible to take measures that regular migrant workers are not precluded from the electoral process and participation in public affairs.³²⁴

This right is also provided under Article 21 of the UDHR, Article 25 of the ICCPR, Article 8 of the ICESCR, Article 5 the ICERD, Article 15 of the CRC, Articles 4, 29, 33 of the CRPD, Article 3 of Protocol No. 1 the ECHR, Articles 7 and 8 of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), Article 23 of the American Convention on Human Rights and in Article 13 of the African Charter on Human and Peoples' Rights.

³²¹ Article 38 of CMW

³²² Article 39 of CMW

³²³ Article 40 of CMW

³²⁴ Article 41 and 42 of CMW

(6) Equal treatment with nationals: A migrant worker shall enjoy equality of treatment with nationals of the State of employment in relation to:

- (a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned;
- (b) Access to vocational guidance and placement services;
- (c) Access to vocational training and retraining facilities and institutions;
- (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents;
- (e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;
- (f) Access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned; and
- (g) Access to and participation in cultural life.³²⁵

The right to participate in cultural life is enshrined in Article 27 of the UDHR. The right is also enshrined in Article 27 of the ICCPR, Article 15 of the ICESCR. Articles 20, 29, 30 and 31 of the CRC, Article 13 of the CEDAW, Article 30 of the CRPD and Articles 17 and 18 of the African Charter on Human and Peoples' Rights.

(7) Right to transfer earnings: Article 47 of the Convention provides that a migrant worker or his family under regular situation has right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State.³²⁶

5. Implementation Mechanism

The Convention requires establishing a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Committee).³²⁷ The Committee is the body of 14 independent experts that monitors implementation of the Convention by its States Parties. It held its first session in March 2004. The Committee consists of state reports, general comments and individual complaints.

³²⁵ Article 40 of the CMW

³²⁶ Article 47 of the CMW

³²⁷ Article 72 of CMW

All States Parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Convention and then every five years. The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of ‘concluding observations.’³²⁸ The process of examining the reports includes their transmission to the International Labour Office, which might assist the Committee in issues falling under the competence of the ILO.

The Committee serves as the main mechanism to monitor and measure States’ abilities to apply the articles of the Convention. The Committee reviews State reports and interact with governmental delegations to enforce the rights in the Convention. Essential to the interaction at the international human rights level is the ability of advocates and activists to provide input during the reporting process to ensure the effectiveness of the Convention.

The Committee encourages governments to use the Convention as a guide in administrative policymaking and legislative practices. There is a List of Issues Prior to Reporting (LOIPR) to guide the entire cycle, and the Concluding Observations to guarantee results before the beginning of the next review.

The Committee under certain circumstances considers individual complaints or communications from individuals claiming their rights under the Convention. The Committee meets in Geneva and normally holds two sessions in a year. The Committee also organizes days of general discussion and can publish statements on themes related to its work and interpretations of the content of the provisions in the Convention.

³²⁸ Articles 73 and 74 of CMW

Chapter Thirteen

RIGHTS OF PERSONS WITH DISABILITIES

1. Background

During the last two decades, an increasing number of countries have increased their commitment to disability,³²⁹ particularly in the area of international development assistance. Many countries have adopted mandatory policies and guidelines requiring the inclusion of persons with disabilities and disability issues in all development programmes. At the same time, many developing countries began to realize that they would not be able to reach their Millennium Development Goals as long as persons with disabilities continue to be discriminated against and marginalized from society.

Similarly, not only did the international community begin to see disability as a necessary component in successful development, it also began to realize that disabled persons have essentially been excluded even within the public international law system. An extensive body of non-binding international documents addressing people with disabilities was already in existence when the Convention on the Rights of People with Disabilities, 2006 (CRPD) was being contemplated by UN Member States. However, the philosophical approach of many of these documents was inconsistent with the principle of equality and full societal inclusion of disabled persons, and their non-binding nature meant that governments infrequently implemented them³³⁰. It increased discussions on the relevance of human rights as a tool for achieving international development goals, encompassing such principles as accountability, empowerment, participation, non-discrimination, and attention to vulnerable groups.³³¹

Given the confluence of these developments, along with prevailing disability specific trends, it is not surprising that the international community developed the

³²⁹ The European Union has adopted a “*Disability Strategy*” intended to promote a “*society open and accessible to*

all.” The Strategy entails: cooperation between the Commission and EU Member States in the disability field; full

participation of people with disabilities in the planning, monitoring and evaluation of changes in policies, practices and programmes; and the mainstreaming of disability in policy formulation by the Commission. http://ec.europa.eu/employment_social/disability/strategy_en.html.

³³⁰ The first of these documents was the 1971 UN Declaration on the Rights of Mentally Retarded Persons.

³³¹ See e.g. “*Human Rights in Development: Rights based approaches*,” OHCHR, available at: <http://www.unhchr.ch/development/approaches-04.html>.

CRPD as an important tool to utilize in both ensuring full equality and inclusion of persons with disabilities, and in achieving a wide variety of development goals.

The Convention does not seek to create new rights for disabled persons, but rather elaborates and clarifies existing obligations for countries within the disability context. It establishes a committee of experts to monitor its implementation at the international level, and it also provides for the operation of independent national level monitoring mechanisms.

The CRPD is also joined by an Optional Protocol that recognizes ‘the competence of the Committee on the Rights of Persons with Disabilities to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.’³³² The CRPD is; therefore, comprehensive not only in terms of its substantive content, but also in the manner in which monitoring and implementation at all levels is addressed.

The CRPD is an international human rights treaty of the United Nations intended to protect the rights and dignity of persons with disabilities. States Parties are required to promote, protect, and ensure the full enjoyment of human rights by persons with disabilities and ensure that they enjoy full equality under the law. The CRPD has served as the major catalyst in the global movement from viewing persons with disabilities as objects of charity, medical treatment and social protection towards viewing them as full and equal members of society, with human rights. It is also the only UN human rights instrument with an explicit sustainable development dimension. The CRPD was the first human rights treaty of the twenty-first century.³³³

2. Overview of the CRPD

The CRPD consists of 50 articles addressing the full array of civil and political, economic, social, and cultural rights.

The first four Articles of the CRPD explain comprehensively the purpose (Article 1), definitions (Article 2), general principles (Article 3) and general obligations (Article 4) on the States Parties to this Convention:

(1) Purpose: Article 1 of the CRPD states that the purpose of this Convention is ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.’

³³² Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 1(1)

³³³ <https://www.un.org/press/en/2006/ga10554.doc.htm>

- (2) Definitions:** Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.³³⁴
- (3) Discriminations:** The CRPD also explains ‘discriminations’ in relations to the persons with disabilities as a ‘distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.’³³⁵
- (4) General principles:** Article 3 of the CRPD provides general principles in relation to the persons with disabilities, including:
- a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
 - b) Non-discrimination;
 - c) Full and effective participation and inclusion in society;
 - d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
 - e) Equality of opportunity;
 - f) Accessibility;
 - g) Equality between men and women;
 - h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.
- (5) General obligations:** Article 4 of the CRPD requires that the States Parties shall ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
- a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
 - b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
 - c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

³³⁴ Article 1, Para 2 of the CRPD

³³⁵ Article 2 of the CRPD

- d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
- e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
- f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in Article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;
- g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;
- h) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities; and
- i) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.³³⁶

3. Rights guaranteed

Articles 5 to 30 of the CRPD explain the rights of persons with disabilities and the obligations of States Parties towards them. Many of these rights are also affirmed in other UN Conventions such as the International Covenant on Civil and Political Rights, 1966 (ICCPR) and International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) but with specific obligations ensuring that they can be fully realized by persons with disabilities are provided in the CRPD. Following are the rights provided under the CRPD to the persons with disabilities:

(1) Equality and non-discrimination: Article 5 of the CRPD provides that:

- a) All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
- b) States Parties shall prohibit all forms of discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

³³⁶ Article 4 of the CRPD

- c) States Parties shall promote equality and eliminate discrimination, and take all appropriate steps to ensure that reasonable accommodation is provided.³³⁷

The right to equality and non-discrimination is such a distinctive human right that it is recognized in almost every human right instrument, including under Article 2 of the Universal Declaration of Human Rights, 1948 (UDHR), Articles 2 and 26 of the ICCPR, Article 2(2) of the ICESCR, Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW), Article 2 of the Convention on the Rights of the Child, 1989 (CRC) and Article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (CMW).

This principle of non-discrimination and equal treatment is also contained in regional instruments, such as Article 14 of the European Convention on Human Rights (ECHR), Article 24 of American Convention on Human Rights and Articles 2 and 3 of African Commission on Human and Peoples' Rights³³⁸ and Article 3 of African Charter on the Rights and Welfare of the Child.³³⁹

- (2) Women with disabilities:** Article 6 of the CRPD provides for the rights of women and girls with disabilities- who may be subjected to multiple discriminations, and in this regard States Parties are required to take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. States Parties are required to take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.³⁴⁰

All relevant rights spelled out by the Universal Declaration on Human Rights and by the ICCPR and ICESCR are the rights of everybody with disabilities. Rights of people with disabilities are also addressed in Article 18 of the African Charter on Human and Peoples' Rights.³⁴¹

- (3) Children with disabilities:** Article 7 of the CRPD requires that necessary measures shall be taken to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. While taking actions concerning children with disabilities, the best interests of the

³³⁷ Article 5 of the CRPD

³³⁸ <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm>

³³⁹ <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-equality-and-non-discrimination>

³⁴⁰ Article 6 of the CRPD

³⁴¹ <http://www.claiminghumanrights.org/disabilities-definition.html>

child shall be a primary consideration. States Parties are required to ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.³⁴²

These rights are also enshrined in Articles 14, 18, 23, 24 the ICCPR,³⁴³ Article 10 of the IESCR and Article 23 of the CRC which focuses on the special circumstances and needs of children with disabilities.

(4) Awareness raising: This right is about making everyone aware that people with disabilities have the same rights as everyone else. Article 8 of the CRPD requires from the States Parties to adopt immediate, effective and appropriate measures:

- a) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;
- b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; and
- c) To promote awareness of the capabilities and contributions of persons with disabilities.³⁴⁴

(5) Accessibility: Accessibility means making sure that people with disabilities have better access to things in all areas of life, such as housing, transport and information. Article 9 of the CRPD requires that States Parties shall:

- a) Take appropriate measures to ensure to persons with disabilities access, on an equal basis with others:
 - (i) To the physical environment;
 - (ii) To transportation;
 - (iii) To information and communications, including information and communications technologies and systems; and
 - (iv) To other facilities and services open or provided to the public, both in urban and in rural areas;
- b) Take measures including the identification and elimination of obstacles and barriers to accessibility at:
 - (i) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces; and

³⁴² Article 7 of the CRPD

³⁴³ <http://www.claiminghumanrights.org/disabilities-definition.html>

³⁴⁴ Article 8 of the CRPD

- (ii) Information, communications and other services, including electronic services and emergency services.
- c) Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
- d) Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities; and
- e) Provide training for stakeholders on accessibility issues facing persons with disabilities.³⁴⁵

(6) Right to life: Article 10 of the CRPD provides that every human being has the inherent right to life and States Parties shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

There are situations when the perceived lower quality of life of persons with disabilities or feelings of mercy and pity have resulted in medical professionals and family members applying practices which have led to the death of persons with disabilities, including newly born children.³⁴⁶ Hence, protection of the right to life is undeniable responsibility of a State.³⁴⁷

The right to life is enshrined in Article 3 of the UDHR, Article 6 of the ICCPR, Article 6 of the CRC, Article 11 of the CMW, Article 4 of the African Charter on Human and People's Rights and Article 2 of the ECHR.

(7) Risk and emergencies: This right is about ensuring that people with disabilities are properly protected when there are risky situations, such as flooding. Article 11 of the CRPD provides States Parties shall take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.³⁴⁸

This Article also calls for International Humanitarian Law to be read with a human rights-based approach to disability. It is important to note that International Humanitarian Law on the other hand has been codified under previously dominant understandings of disability, notably the medical model of disability, which

³⁴⁵ Article 9 of the CRPD

³⁴⁶ Solomon, Martha. "The Rhetoric of Right to Life: Beyond the Court's Decision". Paper firstly presented at the Southern Speech Communication Association (Atlanta, Georgia, April 4–7, 1978).

³⁴⁷ Article 10 of the CRPD

³⁴⁸ Article 11 of the CRPD

focuses exclusively on the impairment of the person and reflects a paternalistic approach to persons with disabilities.

(8) Equal recognition: Article 12 of the CRPD provides that States Parties shall ensure that:

- a) Persons with disabilities have the right to recognition everywhere as persons before the law;
- b) Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;
- c) Appropriate measures are taken to provide access by persons with disabilities to the support they may require in exercising their legal capacity.³⁴⁹

This right is also enshrined in Article 6 of the UDHR, Article 16 of ICCPR, Article 24 of the CMW and Article 5 of the African Charter of Human and People's Rights.

(9) Access to justice: This right is about ensuring that people with disabilities can get justice. Article 13 of the CRPD requires effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. In order to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.³⁵⁰

In strengthening access to justice, the UN system works with national partners to develop national strategic plans and programmes for justice reform and service delivery. UN entities support Member States in strengthening justice in areas including: monitoring and evaluation; empowering the poor and marginalized to seek response and remedies for injustice; improving legal protection, legal awareness, and legal aid; civil society and parliamentary oversight; addressing challenges in the justice sector such as police brutality, inhumane prison conditions, lengthy pre-trial detention, and impunity for perpetrators of sexual and gender-based violence and other serious conflict-related crimes; and strengthening linkages between formal and informal structures.³⁵¹

³⁴⁹ Article 12 of the CRPD

³⁵⁰ Article 13 of the CRPD

³⁵¹ <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>

(10) Liberty and security: Article 14 of the CRPD provides that States Parties shall ensure that persons with disabilities, on an equal basis with others:

- a) Enjoy the right to liberty and security of person; and
- b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.³⁵²

This right is also recognized in other international instruments such as Article 3 of the UDHR Article 6 of the ICCPR, Article 6 of the CRC. This right is also envisaged in Article 1 of American Declaration of the Rights and Duties of Man, 1948 and Article 4 of American Convention of Human Rights, 1969.

(11) Freedom from torture: Article 15 of the CRPD provides that:

- a) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
- b) No one shall be subjected without his or her free consent to medical or scientific experimentation; and
- c) States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.³⁵³

This right is also provided in Article 5 of the UDHR, 7 and 10 of the ICCPR, Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT), Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 5 of African Charter on Human and Peoples' Rights and Article 5 of the American Convention on Human Rights.

(12) Freedom from exploitation: Article 16 of the CRPD requires that the States Parties shall:

- a) Take measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects;
- b) Take measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States

³⁵² Article 14 of the CRPD

³⁵³ Article 15 of the CRPD

Parties shall ensure that protection services are age, gender and disability-sensitive;

- c) Ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities;
- d) Take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs; and
- e) Put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.³⁵⁴

The right to protection from exploitation, violence and abuse is also contained in Article 20 of the ICCPR, Article 10 of ICESCR, Article 19, 34, 36 and 39 of the CRC, Articles 4 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and Article 6 of the CEDAW.

- (13) Protecting the integrity:** Article 17 of the CRPD provides that every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others. Integrity is the quality of being honest and having strong moral principles, or moral uprightness.³⁵⁵ It is a personal choice to hold one's self to consistent standards.³⁵⁶

The word integrity evolved from the Latin adjective integer, meaning whole or complete.³⁵⁷ In this context, integrity is the inner sense of 'wholeness' deriving from qualities such as honesty and consistency of character. As such, one may judge that others 'have integrity' to the extent that they act according to the values, beliefs and principles they claim to hold. This right is also enshrined in Article 3 of the EU Charter of Fundamental Rights.

- (14) Liberty of movement and nationality:** Article 18 of the CRPD recognizes the rights of persons with disabilities to liberty of movement, to freedom to

³⁵⁴ Article 16 of the CRPD

³⁵⁵ Article 17 of the CRPD

³⁵⁶ *Integrity: Doing the Right Thing for the Right Reason*. McGill-Queen's University Press, 2010.

³⁵⁷ "Integrity". *The American Heritage Dictionary of the English Language* (4th ed.). El-shaddai, 2000.

choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

- a) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
- b) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
- c) Are free to leave any country, including their own;
- d) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country; and
- e) Have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.³⁵⁸

This right of nationality is also enshrined in Article 15 of the UDHR, Article 24 of the ICCPR, Article 7 and 8 of the CRC, Article 6 of the CAT, Article 29 of the CMW, Article 20 of the American Convention on Human Rights, and Article 8 of the European Convention on Human Rights.

The right of Freedom of Movement is enshrined in Article 13 of the UDHR, Article 12 of the ICCPR, Article 10 of CRC, Article 5, 8 and 39 of the CMW, and Article 12 of the African Charter on Human and Peoples' Rights.

(15) Living independently: Article 19 of the CRPD provides about ensuring people with disabilities can live in and be part of their community, and have the same choices as everyone else about where they live and who they live with. This includes making sure that the right services are available in the community to make this possible.³⁵⁹

(16) Personal mobility: Article 20 of the CRPD requires ensuring that people with disabilities can move around and be as independent as possible. This could include providing mobility aids. It requires that States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

- a) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;

³⁵⁸ Article 18 of the CRPD

³⁵⁹ Article 19 of the CRPD

- b) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;
- c) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities; and
- d) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.³⁶⁰

(17) Freedom of expression: This is about ensuring that people with disabilities can express their opinions and ideas, and access information in various alternative or accessible formats. This includes accepting, facilitating and promoting the use of sign language. Article 21 of the CRPD provides that States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, including by:

- a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
- c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities; and
- d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
- e) Recognizing and promoting the use of sign languages.³⁶¹

This right is also enshrined in Article 19 of the UDHR, Article 19 and 20 and the ICCPR, Article 12 and 13 of the CRC, and Article 13 of the CMW.

(18) Respect for privacy: Article 22 of the CRPD provides that no person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or

³⁶⁰ Article 20 of the CRPD

³⁶¹ Article 21 of the CRPD

correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.³⁶²

The right is also enshrined in Articles 14 and 17 of the ICCPR, Article 16 and 40 of the CRC, Article 14 of the CMW, and Article 4 of the African Charter on Human and Peoples' Rights.

(19) Respect for family: Article 23 of the CRPD provides that States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

- a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;
- b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided; and
- c) Persons with disabilities, including children, retain their fertility on an equal basis with others.³⁶³

The right to respect for the family is contained in Articles 23 and 17 of the ICCPR, Article 5 of the CERD, Article 16 of the CEDAW, and Article 16 of the CRC.

(20) Right to education: This is about ensuring that children with disabilities can have a high quality education that helps them to reach their potential, in the same way as all other children. Article 24 of the CRPD provides that States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

- a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
- b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; and

³⁶² Article 22 of the CRPD

³⁶³ Article 23 of the CRPD

- c) Enabling persons with disabilities to participate effectively in a free society.³⁶⁴

The right to education is enshrined in Article 26 of the UDHR, Articles 10, 13, and 14 of the ICESCR, Articles 23, 28, 29 and 40 of the CRC, Articles 31, 34, 43 and 45 of the CMW, Articles 5, 10, 14 and 16 of the CEDAW, Articles 17 and 18 of the African Charter on Human and Peoples' Rights.³⁶⁵

- (21) Right to health:** This right ensures that people with disabilities can access high quality health services and are treated the same way as everyone else in healthcare services. Article 25 of the CRPD recognizes that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation.³⁶⁶

The right to an adequate standard of living (health) is enshrined in Article 25 of the UDHR³⁶⁷, Article 11 of the ICESCR, Article 27 of the CRC, Article 43 of the CMW, and Article 14 of the CEDAW.

22) Right to habilitation: This right is about ensuring that people with disabilities can live the most independent and healthy life possible, and providing support in health, works, education and social services to help make this happen. Article 26 of the CRPD provides that States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths and support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.³⁶⁸

³⁶⁴ Article 24 of the CRPD

³⁶⁵ http://www.claiminghumanrights.org/education_definition.html

³⁶⁶ Article 25 of the CRPD

³⁶⁷ Alfredsson, Gudmundur; Eide, Asbjorn (1999). *The Universal Declaration of Human Rights: a common standard of achievement*. Martinus Nijhoff Publishers.

³⁶⁸ Article 26 of the CRPD

23) Right to work: This right is about making sure that people with disabilities have the same chances to work as everyone else, and the same rights within work. This includes taking steps to help disabled people get and keep a job, such as making reasonable accommodations. Article 27 of the CRPD recognizes the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to:

- a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
- b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
- c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
- d) Enable persons with disabilities to have effective access to general, technical and vocational guidance programmes, placement services and vocational and continuing training;
- e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
- f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
- g) Employ persons with disabilities in the public sector;
- h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; and
- i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace.³⁶⁹

The right to work is also enshrined in Article 23 of the UDHR, Article 6 of the ICESCR, Articles 51 to 55, 58, 59 and 64 of the CMW, and Article 11 of the CEDAW.

³⁶⁹ Article 27 of the CRPD

24) Right living and social protection: This right is about ensuring that people with disabilities have a decent standard of living including food, clothing and housing, and can get help to avoid poverty and improve their standard of living on an equal basis with others. Article 28 of the CRPD requires that States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

States Parties are required to take appropriate steps to safeguard and promote the realization of this right, including measures:

- a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
- b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
- c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
- d) To ensure access by persons with disabilities to public housing programmes; and
- e) To ensure equal access by persons with disabilities to retirement benefits and programmes.³⁷⁰

The right to social security and adequate standard of living is also enshrined in Articles 22 and 25 of the UDHR, Article 9 of the ICESCR, Article 11 of the ICESCR, Articles 11 and 14 of the CEDAW, Article 26 and of the CRC, and Articles 27, 43 and 61 of the CMW.

25) Right to participation in public life: This right guarantees that people with disabilities can get involved with politics, including being able to vote, and having the opportunity to stand for elections. Article 29 of the CRPD guarantees to persons with disabilities political rights and the opportunities to enjoy them on an equal basis with others, and shall undertake to:

- a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others; and

³⁷⁰ Article 28 of the CRPD

- b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others.³⁷¹

This right is also enshrined in Article 21 of the UDHR, Article 25 of the ICCPR, Articles 7, 8 and 11 of the CEDAW, and Article 13 of the African Charter on Human and Peoples' Rights.

26) Right to Participation in cultural life: This right is about ensuring that people with disabilities have equal opportunities to take part in activities such as sports and visiting museums and other places of interest. It also includes having an equal right to identity in relation to language and culture, including sign languages. Article 30 of the CRPD requires that States Parties shall take all appropriate measures to ensure that persons with disabilities:

- a) Enjoy access to cultural materials in accessible formats;
- b) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats; and
- c) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.³⁷²

The right to participate in cultural life is enshrined in Article 27 of the UDHR, Article 27 of the ICCPR, Article 15 of the ICESCR, Article 13 of the CEDAW, Articles 20, 29, 30 and 31 of the CRC, Articles 31, 34, 43 and 45 of the CMW, and Articles 17 and 18 of the African Charter on Human and Peoples' Rights.

4. Implementation mechanism

The CRPD provides its implementation mechanism, among others, through Focal Points designated by the States Parties and the Committee on the Rights of Persons with Disabilities (the Committee) in following manner:

- (1) Focal Point:** To ensure implementation and monitoring of the Convention, countries are to designate a focal point in the government and create a national mechanism to promote and monitor implementation.³⁷³ Article 33 explains that States Parties must set up national focal points in the governments in order to monitor implementation of the Convention's precepts. States Parties must also set

³⁷¹ Article 29 of the CRPD

³⁷² Article 30 of the CRPD

³⁷³ Article 33 of the CRPD

up some sort of independent monitoring mechanisms, which usually takes the form of an independent national human rights institution.

(2) Committee on the Rights of Persons with Disabilities. A Committee on the Rights of Persons with Disabilities (the Committee), made up of independent experts,³⁷⁴ receives periodic reports from States Parties on progress made in implementing the Convention.

States Parties submit reports to the Committee every two years after the Convention has entered into force. The reports are required to provide a comprehensive explanation on the progress made towards implementation of the Convention.

All States Parties are required to submit reports to the Committee outlining the legislative, judicial, policy and other measures they have taken to implement the rights affirmed in the Convention. The first report is due within two years of ratifying the Convention; thereafter reports are due every four years.³⁷⁵ The Committee examines each report and addresses its concerns and recommendations to the State Party in the form of ‘concluding observations.’

The members of the Committee serve in their personal capacity and to be of high moral standing and recognized competence and experience in the field of disability. The members of the Committee are elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties.

³⁷⁴ Article 34 of the CRPD

³⁷⁵ Article 35 of the CRPD

Chapter Fourteen

PROTECTION FROM ENFORCED DISAPPEARANCE

1. Introduction

The enforced disappearance constitutes a crime and, in certain circumstances, it is defined as a crime against humanity under international law. The United Nations and most of its Member States are determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance, considering the right of any person not to be subjected to enforced disappearance, recognizing the right of victims to justice and to reparation.

The rights of any victim to know the truth about the circumstances of an enforced disappearance and the fate of a disappeared person, and the right to freedom to seek, receive information to this end are now well recognized under the international law. Therefore, the International Convention for Protection of All Persons from Enforced Disappearance, 2006 (the Convention) was adopted, to protect human rights of all persons. This was outcome of more than 25 years of efforts, within the framework of the United Nations, by associations of families of missing persons, other non-governmental organisations, and a number of States, which particularly played active roles.

On 20th December 1978, the UN General Assembly adopted a Resolution requesting the Commission on Human Rights to consider, inter alia, the question of disappeared persons. Based on the work of the Commission in this field, the UN General Assembly later adopted a declaration on 18th December 1992, titled Declaration on the Protection of All Persons from Enforced Disappearances.

In 2000, on the basis of recommendations of the Sub-Commission on the Promotion and Protection of Human Rights, an Open-ended Working Group of the Commission was established with the mandate to prepare a draft for a legally binding normative instrument for the protection of all persons from enforced disappearance. Resultantly, on 20th December 2006, the General Assembly, on the recommendations of the Human Rights Council (which had then replaced the Commission on Human Rights) adopted the Convention and opened it for signature, ratification and accession.

The Convention on Enforced Disappearances, 2006 entered into force on 23rd December 2010. The Convention is divided into three parts:

- (1) Part I (Articles 1 to 25) proclaims that no one shall be subjected to enforced disappearance (Article 1, paragraph 1), defines 'enforced disappearances,' and identifies the obligations incumbent upon States Parties, including the obligation to take appropriate measures to investigate the relevant acts (Article 3) and to take the necessary measures to ensure that enforced disappearance

constitutes an offence under its criminal law (Article 4). It also imposes, *inter alia*, obligations upon States concerning jurisdiction and prosecution of such crime;³⁷⁶

- (2) Part II (Articles 27 to 36) establishes a Committee on Enforced Disappearances and regulates its work for the purposes identified by the Convention; and
- (3) Part III (Articles 37 to 45) contains provisions relating to signatures, ratifications, accessions and entry into force of the Convention.

2. Rights guaranteed

The Convention comprehensively prohibits all forms of enforced disappearances by ruling out any exceptional circumstances or limitations on the right of a person not to be enforced to disappear. The Convention provides rights to individuals and imposes certain duties on a State discussed as under:

(1) No exception and no limitation

Article 1 of Convention provides that no one shall be subjected to enforced disappearance. This right is absolute and is not subject to any limits or exceptions. It further provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

Before the enforcement of this Convention, prohibition on enforced disappearances was limited in its scope; some precisely defined circumstances were covered under international humanitarian law or some international legal instruments with regional application, such as the Inter-American Convention on Forced Disappearances.

International humanitarian law, especially the 1949 Geneva Conventions and their protocols, contains specific rules aimed at limiting the effects of armed conflicts and preventing disappearances but they do not cover peacetime situations and do not prohibit disappearances as such. Similarly, the Rome Statute setting up the International Criminal Court (ICC) states that enforced disappearances constitute a crime against humanity, but only when committed in the context of a widespread or systematic attack directed against a civilian population.

(2) Enforced disappearance defined

The offence of enforced disappearance is expressly defined in Article 2 of the Convention as ‘the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to

³⁷⁶ <http://legal.un.org/avl/ha/icpped/icpped.html>

acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.’

An enforced disappearance is defined by three cumulative elements:

- (a) Deprivation of liberty against the will of the person;
- (b) Involvement of government officials, at least by acquiescence; and
- (c) Refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.³⁷⁷

The question of intent was one of the most difficult aspects to deal with during the negotiation process. The drafters of the Convention finally decided to opt for ‘constructive ambiguity’, with the result that the text leaves it up to each State to interpret Article 2 as it wishes,³⁷⁸ thus setting itself somewhat apart from the Rome Statute, whose definition of enforced disappearances expressly includes the element of *mens rea* (guilty intention).³⁷⁹

It is apparent from the definition that what entails enforced disappearance is primarily responsibility of the State by commission or omission. So, enforced disappearance differs with other forms of disappearances, for instance when a person disappears voluntarily, disappears due to accidents, disasters or conflicts, or disappearance as a consequence of common crimes.

(3) State obligation to investigate

The Convention imposes specific obligations on States to prevent enforced disappearances and combat impunity. It requires that each State Party shall take appropriate measures to investigate acts of enforced disappearances (defined in Article 2) committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

The obligation to investigate with due diligence was originally included in the first judgment of the Inter-American Court of Human Rights in the Velásquez Rodríguez case³⁸⁰ and later developed in multiple court judgments. The first set of Court judgments dealt with the complete lack of national investigations in many

³⁷⁷ Working Group on Enforced or Involuntary Disappearances. <https://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx>

³⁷⁸ See the statements of China, Egypt, the United Kingdom, the United States, Canada, India and Japan in documents E/CN.4/2006/57, A/HRC/1/SR.21 and A/C.3/61/SR.45 in favour of an intent component.

³⁷⁹ See Article 7, paragraph 2 (i) of the Rome Statute.

³⁸⁰ Inter-American Court of Human Rights, “*Velásquez Rodríguez v. Honduras*”, judgment of 29 July 1988, para. 177.

Latin American countries, which had faced dictatorships from the 1960s to the 1980s. *Habeas corpus* (order to produce a person before the court) proceedings were usually futile, judiciaries commonly lacked impartiality and the systems for criminal investigation and prosecution were not prepared to deal with crimes committed or sponsored by States.

After difficult and prolonged discussions, a compromise solution was adopted on this issue: immediately after Article 2, which only mentions the State as the perpetrator, to make a State responsible to investigate enforced disappearance to bring ‘responsible to justice.’³⁸¹

It clearly emerges that enforced disappearance, as such in principle, is an act that must be attributable to a State. The obligations mentioned are exclusively incumbent upon the State, to the exclusion of any private entity, such as armed groups outside the ambit of state authority. It is the obligations of the State to conduct investigations and ‘bring those responsible to justice.’

Enforced disappearances differ from other crimes against a person’s liberty because of the participation of the State (directly or with its support or acquiescence) and the denial of such a deprivation of liberty or concealment of the fate or whereabouts of the victim. This generates impunity and harms the relatives of the disappeared, who are also considered victims of the crime, in a particular way.

(4) Criminalization under domestic law

The Convention requires mandatory establishment of an offence combined with appropriate penalties in domestic law. It requires that each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law’ (Article 4).

The absence of an autonomous criminal offence would make it impractical to implement certain provisions of the Convention, the drafters wanted states to enter into a commitment to make enforced disappearance an offence under their domestic criminal law. Since a State Party undertakes to bring the perpetrators of enforced disappearances to justice (Article 3), it must prescribe ‘appropriate’ penalties that take account of the ‘extreme seriousness’ of the ‘offence of enforced disappearance’ (Article 7). Aggravating circumstances may in particular be established in the case of the death of the missing person or the commission of an enforced disappearance in respect of vulnerable persons (pregnant women, people

³⁸¹ For a full analysis of the process of negotiating and drawing up this Convention, see Olivier de Frouville, “*La Convention internationale pour la protection de toutes les personnes contre les disparitions forcées : les enjeux juridiques d’une négociation exemplaire*” in *Droits Fondamentaux* no. 6, December-January 2006.

with disabilities, etc.); mitigating circumstances may be established for repentant offenders who assist in establishing the truth.

(5) Crime against humanity

Article 5 of the Convention provides that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

The 1992 Declaration for the Protection of All Persons from Enforced Disappearances has also affirmed the connection between enforced disappearances and crimes against humanity. It states, in the 4th Preambular paragraph that the 'systematic practice of enforced disappearance is by its very nature a crime against humanity.' The Working Group considered that this provision needs to be interpreted in the view of legal developments, which have occurred since 1992.

The notion of crimes against humanity has been recognized for a long time in international law. The connection between enforced disappearances and crimes against humanity was explicitly acknowledged in the 1983 Resolution 666 of the General Assembly of the Organisation of American States, which described the practice of enforced disappearances per se, as crime against humanity; in other words, any act of enforced disappearance is considered to be a crime against humanity.

The 1994 Inter-American Convention on Forced Disappearance of Persons reaffirms, in its 6th Preambular paragraph 'that the systematic practice of enforced disappearances of persons constitutes a crime against humanity.'

The 1998 Rome Statute, Article 7 paragraph 1, establishing the International Criminal Court, also gives a general definition of the concept of crime against humanity, including enforced disappearance: 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of

apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

This definition includes several criteria: for the purposes of this present Statute ‘crimes against humanity’ means any of the following acts where committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

A judgment of the ad hoc International Criminal Tribunal for the Former Yugoslavia Appeals Chamber in the *Kunarac and others case*³⁸² considered that the contextual elements of the crime against humanity are the following:

- (a) There has been an “attack”;
- (b) The attack was targeting any civilian population;
- (c) This attack must have been widespread or systematic; and
- (d) The perpetrator had knowledge of the attack.

When there are claims of practices of enforced disappearances which may amount to crimes against humanity, the Working Group on Enforced Disappearances evaluates these claims in the light of the provisions of the Convention and the criteria listed in Article 7(1) of the Rome Statute, as interpreted by international tribunals and, if appropriate, will refer them to the competent authorities, be they international, regional or domestic.³⁸³

(6) Holding the perpetrators responsible

The Convention, under Article 6, requires that a State Party shall take the necessary measures to hold criminally responsible:

- (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;
- (b) A superior who:
 - (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
 - (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
 - (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance

³⁸² International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber in the *Kunarac and others case* (12th June 2002, IT-96-23 & 23/1-A, see par. 71-105).

³⁸³ General comment of Working Group, *Enforced disappearances as a crime against humanity*, https://www.ohchr.org/Documents/Issues/Disappearances/GCas_crime_against_humanity.pdf

or to submit the matter to the competent authorities for investigation and prosecution.

States Parties under the Convention undertake to prosecute both those who commit enforced disappearances and anyone who orders or is an accomplice to or participates in such an offence. The Convention also emphasises a superior's responsibility by omission or commission, and in this connection that 'no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance' a principle well established in international law since Nuremberg and Tokyo trials in the wake of World War II.³⁸⁴ Sub Article (2) of the Article 6 of the Convention further rules out any form of exceptional circumstances to justify an offence of enforced disappearance.

(7) Punishment, mitigating and aggravating circumstances

The Convention provides that a person who is found guilty of having been implicated in the commission of the crime of enforced disappearance shall be punished by 'appropriate penalties' (Article 7). Appropriate penalties are those that take the extremely serious nature of this crime into account.

The Conventions allows to the States Parties for establishing mitigating circumstances. The text of this Article formulates these possibilities in terms of 'may establish,' leaving discretion to States Parties whether to use them or not.

Mitigating circumstances are permissible when the convicted person has contributed effectively to (a) finding the person back alive, or (b) facilitating the clarification of the enforced disappearance or the identification of the perpetrators.

The aggravating circumstances may include *inter alia* the death of the disappeared person and when the disappeared person belongs to a vulnerable group of persons such as pregnant women or minors.

(8) Compensation and Reparation

Besides the obligation to punish the perpetrators as described in the previous section, the Conventions requires from a State Party to ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. The Convention codifies an elaborate right to obtain reparation and the obligation to take steps with regard to the legal situation of the disappeared person.

The right to obtain reparation (Article 24) covers material and moral damages and, where appropriate, other forms of reparation such as:

(a) Restitution;

³⁸⁴ See Article 8 of the Statute of the International Military Tribunal of Nuremberg.

- (b) Rehabilitation;
- (c) Satisfaction, including restoration of dignity and reputation; and
- (d) Guarantees of non-repetition.

3. Reporting and complaints procedure

(1) Reporting procedure

A State Party to the Convention submits an initial report within two years of acceding to the treaty (Article 29). On the basis of the State's report, as well as input from civil society organizations, the Committee on Enforced Disappearances evaluates the government's implementation of the Convention. The initial report and subsequent periodic reports must include both:

- (a) A common core document; and
- (b) A treaty-specific document.

In the common core document, the State provides general information about the country, its government, and the national framework for protecting and promoting human rights. In the treaty-specific document, all information shall be given in the light of specific guidelines published by the Committee on Enforced Disappearances³⁸⁵ for submission of information for implementation of each Article of the Convention.³⁸⁶

After receiving the State's Report, the Committee holds a pre-session meeting to draft a list of issues on which it intends to focus. The State Party is expected to transmit a short reply to the list of issues. During one of its semi-annual sessions, the Committee will then engage in a constructive dialogue with the relevant State Party's representatives. As discussed in greater detail below, non-governmental organizations and other stakeholders may participate in the review by submitting 'alternative' or 'shadow reports and may also observe the constructive dialogue.

After the Committee examines each State's report, it adopts Concluding Observations following a closed plenary meeting. Generally, each set of Concluding Observations is formatted to include:

- (a) A brief introduction;
- (b) A section on positive aspects the State has followed in the light of the Convention;

³⁸⁵ See Committee on Enforced Disappearance Guidelines under article 29, adopted in its second session (26–30 March 2012), UN Doc. CED/C/2, 8 June 2012.

³⁸⁶ See the UN Secretary General's Compilation of Guidelines on the Form and Content of Reports to be submitted by States Parties to the International Human Rights Treaties, UN Doc. HRI/GEN/2/Rev.6, 3 June 2009.

- (c) Subjects of concern and related recommendations; and
- (d) Follow up and requests for dissemination.

The Committee, on noting any pressing issue of concern, may request the State Party to submit additional information and then issues Concluding Observations. Throughout this process, two members of the Committee serve as country Rapporteurs and remain responsible for conducting the State Party's review and facilitating the process of developing the list of issues and drafting concluding observations.

(2) Urgent interventions

The Committee accepts requests for urgent action needed to seek and find a disappeared person (Article 30). If a request for urgent action meets the Committee's requirements, the Committee requests the State to provide information on the disappeared person's situation and may make recommendations to the government, including that it take all steps necessary to locate and protect the person. The Committee's recommendations may also include 'interim measures,' which means it may formally request the State to take whatever actions necessary to avoid causing or allowing irreparable harm to the victim.

A request for urgent action must:

- (a) Be in writing;
- (b) Not be anonymous,
- (c) Reference a State Party to the Convention, and
- (d) Be submitted by representatives of the disappeared person or anyone with a legitimate interest in finding him or her.

A request may not normally be granted if:

- (a) The request has not been duly presented to competent bodies of the State Party concerned if such a possibility exists;
- (b) The same matter is already under examination by a similar mechanism of international investigation; such as the Working Group on Enforced or Involuntary Disappearances; or
- (c) The request refers to an enforced disappearance that began before the State concerned became a party to the Convention.

(3) Individual complaints

The Committee, under Article 31 of the Convention, is authorized to consider complaints by individuals concerning violations of the Convention if the State is allegedly responsible for those violations.³⁸⁷ The Committee first makes a

³⁸⁷ As of February 2014, 17 State Parties have accepted the complaints procedure.

decision on the admissibility of the individual complaint based on the criteria set forth in Article 31 of the Convention and its Rules of Procedure. If the complaint is admissible, the Committee then issues a decision on the merits in which it indicates whether or not the State is responsible for violating the Convention.

Complaints may be submitted using the model complaint form, which asks complainants to identify:

- (a) Basic information regarding the author of the communication and the victim of the enforced disappearance;
- (b) The State Party the complaint is directed against;
- (c) A chronological list of relevant facts;
- (d) The Convention rights allegedly violated
- (e) Information regarding exhaustion of available domestic remedies;
- (f) Whether the complaint has been submitted to other international procedures; and
- (g) Whether the individual also requests interim measures.

(4) Inter-State complaints

The Convention provides a mechanism for a State to complain about violations of the Convention committed by another State (Article 32). Both States concerned must have made declarations accepting this procedure, otherwise the complaint will not be considered. This procedure for inter-State complaints, however, has never been used.

Chapter Fifteen

RIGHTS OF THE MINORITIES

1. Introduction

Minority rights, as applicable to ethnic, religious or linguistic minorities and indigenous peoples, are an integral part of international human rights legal regime. The recognition and protection of minority rights under international law began with the erstwhile League of Nations (1920), through the adoption of several ‘minority treaties’.³⁸⁸

When the United Nations replaced the League of Nations in 1945, it too, gradually developed a set of norms, procedures and mechanisms with respect to minorities.³⁸⁹ Although the Charter of the United Nations makes no mention of minority rights per se; however, it does include several general provisions about human rights, including its Article 1 (3), which identifies that one of the purposes of the United Nations is the achievement of international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.”³⁹⁰

Similarly, in 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights (UDHR), which articulated the content of human rights in much greater detail and still remains one of the most important international human rights documents; ‘its anti-discrimination provisions and other Articles are of central importance also for persons belonging to minorities.’³⁹¹

In 1965, the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination, which clearly prohibits any distinction whatsoever ‘based on race, colour, descent, national or ethnic origin.’³⁹²

³⁸⁸“Promoting Minorities Rights: A Guide for Advocates”. United Nation Office of the Commission for Human Rights. 2012. http://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf

³⁸⁹Protection of Minorities and Indigenous People Respecting Cultural Diversity. Deiter Kugelman. 2007. http://www.mpil.de/files/pdf1/mpunyb_06_kugelmann_11.pdf

³⁹⁰“Promoting Minorities Rights: A Guide for Advocates”. United Nation Office of the Commission for Human Rights. 2012. http://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf

³⁹¹Ibid.

³⁹²“International Convention on the Elimination of all forms of Racial Discrimination (ICERD).” UNOCHR. 1965.

Furthermore, in 1966, the International Covenant on Civil and Political Rights (ICCPR) included Article 27 having specific provision about minorities. The Article 27 states that ‘in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.’

However, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Minorities Declaration, 1992) is the fundamental instrument, though still a guiding Declaration and not a binding Convention, that guides the activities of the United Nations to recognize and protect the rights of persons belonging to minorities.³⁹³

Although these developments are vital in recognizing and promoting minority rights, yet in practice these rights are far from being realized.³⁹⁴ Minorities around the world are also often the victims of armed conflict and internal strife. The situation of refugees and internally displaced persons from minority backgrounds, in particular women and children, is of special concern.³⁹⁵ The promotion and protection of the rights of minorities require particular attention to be paid to the issues including:

- (1) recognition of minorities’ existence;
- (2) efforts to guarantee their rights to non-discrimination and equality;
- (3) promotion of multicultural and intercultural education, nationally and locally;
- (4) promotion of their full participation in all aspects of public life;
- (5) inclusion of their needs in development and poverty-reduction processes;
- (6) reduction of disparities in social indicators such as employment, health and housing; and

<http://www2.ohchr.org/english/law/cerd.htm>.

³⁹³ UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, U.N. Doc.A/RES/47/135 (Dec 18, 1992). www.un.org/documents/ga/res/47/a47r135.htm.

³⁹⁴ Ibid.

³⁹⁵ “Promoting Minorities Rights: A Guide for Advocates”. United Nation Office of the Commission for Human Rights. 2012. http://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf

(7) empowerment of women and care of children belonging to minorities.³⁹⁶

2. Rights guaranteed

The rights of the minorities provided in UN Minorities Declaration, 1992 are considered as core rights of the minorities, which are:

- (1) right to identity;
- (2) right to culture, religion, and language;
- (3) right to participation;
- (4) right to decision making;
- (5) right to association; and
- (6) right to no discrimination and no disadvantage.

(1) Right to identity

States Parties shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. States shall adopt appropriate legislative and other measures to achieve those ends (Article 1),

Minorities have the right to exist, and to be recognized as the groups they define themselves to be. Survival and existence of minorities is at the core of UN efforts to ensure the protection of the physical existence of persons belonging to minorities, including protecting them from genocide and crimes against humanity across the world. According to Article 1 of UN Minorities Declaration, 1992 States Parties shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall

³⁹⁶ OHCHR, *Minority Rights: International Standards and Guidance for Implementation* (2010). www.ohchr.org/Documents/Publications/MinorityRights_en.pdf.

encourage conditions for the promotion of that identity and shall adopt appropriate legislative and other measures to achieve those ends.³⁹⁷

Articles 2 and 4 of Convention on the Prevention and Punishment of the Crime of Genocide, 1948 also bind states to protect minorities against genocide and other crimes³⁹⁸ because genocide, the attempted destruction of a group, is the ultimate violation of rights of minorities.³⁹⁹ Minorities can also be threatened by the simple denial of their existence, especially when such a denial is official state policy.

Central to the rights of minorities is the promotion and protection of their identity. Promoting and protecting their identity prevent forced assimilation and the loss of cultures, religions and languages - the basis of the richness of the world and, therefore, part of its heritage.⁴⁰⁰ Article 27 of the ICCPR protects the rights of persons belonging to minorities to their national, ethnic, religious or linguistic identity, or a combination thereof, and to preserve the characteristics, which they wish to maintain and develop.

Separate identity and non-assimilation of the minorities requires diversity and plural identities to be not only tolerated but also protected and respected.⁴⁰¹ Minority rights are about ensuring respect for distinctive identities while ensuring that any differential treatment towards groups or persons belonging to such groups does not mask discriminatory practices and policies. Therefore, positive action is required to respect cultural, religious and linguistic diversity, and acknowledge that minorities enrich society through this diversity.⁴⁰²

The Durban Declaration, 2001, reaffirms this principle. According to paragraph 66 of the Declaration ‘the ethnic, cultural, linguistic and religious identity of

³⁹⁷ “UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities”, U.N. Doc.A/RES/47/135 (Dec 18, 1992). www.un.org/documents/ga/res/47/a47r135.htm.

³⁹⁸ “Convention on the Prevention and Punishment of the Crime of Genocide”. 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: <http://www.refworld.org/docid/3ae6b3ac0.html>

³⁹⁹ “Promoting Minorities Rights: A Guide for Advocates”. United Nation Office of the Commission for Human Rights. 2012. http://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf

⁴⁰⁰ “Promoting Minorities Rights: A Guide for Advocates”. United Nation Office of the Commission for Human Rights. 2012. http://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf

⁴⁰¹ UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, U.N. Doc. A/RES/47/135 (Dec 18, 1992). www.un.org/documents/ga/res/47/a47r135.htm.

⁴⁰² Ibid.

minorities, where they exist, must be protected and that persons belonging to such minorities should be treated equally and enjoy their human rights and fundamental freedoms without discrimination of any kind.⁴⁰³

With the escalation of violent intra-state armed conflicts, particularly after 1980s, these threats to minority groups have increased by many folds.⁴⁰⁴ At times of conflict minorities groups are among the most marginalized groups in society and experience higher rates of mortality, limited access to health services, and poorer health outcomes.⁴⁰⁵ According to the United States Commission on International Religious Freedom there are severe systematic ongoing and egregious violations of religious freedom happening in 27 different countries.⁴⁰⁶

In 2004, the former United Nations Secretary General Kofi Annan at the Stockholm International Forum emphasized on the importance of taking tangible measures to protect the rights of minorities, as they are genocide's most frequent targets.⁴⁰⁷ The Religious Freedom in the World Report, 2016 by Aid to the Church in Need revealed that 38 of the world's 196 countries showed unmistakable evidence of significant religious freedom violations, with 23 amounting to outright persecution.⁴⁰⁸

The 2016 Interim Report of Mr. Heiner Bielefeldt, then Special Rapporteur of the United Nations on Freedom of Religion or Belief, described that violations of religious rights of minorities exceed the methodical, continuous and appalling violations committed by state and non-state actors such as terrorism, vigilantism, mass and individual killings, forcible deportations, ethnic cleansing, the rape and kidnapping of women and selling them into slavery, destruction and confiscation of property, attacks against converts and those who are alleged to have induced

⁴⁰³“Promoting Minorities Rights: A Guide for Advocates”. United Nation Office of the Commission for Human Rights. 2012. http://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf

⁴⁰⁴UN Office of the High Commissioner for Human Rights, Towards Developing Country Engagement Strategies on Minorities: An Information Note for OHCHR Staff and Other Practitioners. www.ohchr.org/Documents/Publications/Strategies_on_minoritiesEN.pdf.

⁴⁰⁵Ibid.

⁴⁰⁶“2016 Annual Report”. United States Commission on International Religious Freedom. 2016.

⁴⁰⁷“Minority Rights International Standard and Guidance for Implementation”. United Nation. 2010. http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf

⁴⁰⁸“Religious Freedom in the World”. Aid to the Church in Need. 2016.

them, and encouraged or condoned violence against non-believers and persons belonging to religious minorities.⁴⁰⁹

(2) Right to culture, religion and language

Article 2(1) of the UN Minorities Declaration, 1992 provides that persons belonging to national, ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.

Provisions regarding right to culture, religion and language are also contained in Articles 18 and 27 of Universal Declaration of Human Rights, 1948, Article 27 of International Covenants on Civil and Political Rights, 1966, and Articles 1 and 15 of International Covenants on Economic, Social and Cultural Rights, 1966.

Such provisions also appear in a number of specialized international instruments, including: ILO Convention concerning Discrimination in Respect of Employment and Occupation No. 111, 1958 (Article 5), UNESCO Convention against Discrimination in Education, 1960 (Article 5), Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (Article 12), Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981 (Article 1) and Convention on the Rights of the Child, 1989 (Articles 14, 29 and 30)⁴¹⁰, allowing for temporary special measures which accelerate de facto equality between men and women.⁴¹¹

The lack of respect for, lack of protection and lack of fulfillment of the rights of minorities including right to culture, religion and language may be at least a contributing factor if not the primary cause of displacement and may-in the worst

⁴⁰⁹“Health and Human Rights Resource Guide”. Center for Health and Human Rights at the Harvard School of Public Health.<https://www.hhrguide.org/2014/03/18/how-is-minority-health-a-human-rights-issue/>

⁴¹⁰“Minority Rights International Standard and Guidance for Implementation”. United Nation. 2010. http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf

⁴¹¹UN Office of the High Commissioner for Human Rights, Towards Developing Country Engagement Strategies on Minorities: An Information Note for OHCHR Staff and Other Practitioners. www.ohchr.org/Documents/Publications/Strategies_on_minoritiesEN.pdf.

cases-even lead to the extinction of such communities.⁴¹² The displacement of minorities can thus serve as an indicator of the degree to which their rights are respected, protected and fulfilled in the country from which they are displaced.⁴¹³

(3) Right to participation

The participation of persons belonging to minorities in public affairs and in all aspects of the political, economic, social and cultural life of the country where they live is in fact essential to preserve their identity and combating social exclusion. Thus, persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. Article 2(2)

Provisions related to right to participation are also contained in Article 27 of Universal Declaration of Human Rights, 1948, and Articles 13 of International Covenants on Economic, Social and Cultural Rights, 1966.

Such provisions also appear in a number of specialized international instruments, including: International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (Article 4), UNESCO Declaration on Race and Racial Prejudice, 1978 (Articles 6), Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (Article 11), and Convention on the Rights of the Child, 1989 (Article 23).⁴¹⁴

Mechanisms are required to ensure that the diversity of society with regard to minority groups is reflected in public institutions, such as national parliaments, the civil service, including the police and the judiciary, and that persons belonging to minorities are adequately represented, consulted and have a voice in decisions which affect them or the territories and regions in which they live.

Right to decision making

Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the

⁴¹²“Promoting Minorities Rights: A Guide for Advocates” .United Nation Office of the Commission for Human Rights. 2012. http://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf

⁴¹³Ibid.

⁴¹⁴“Minority Rights International Standard and Guidance for Implementation”. United Nation. 2010. http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf

minorities to which they belong or the regions in which they live, in a manner not incompatible with national legislation. Article 2(3)

Provisions regarding right to decision making are also contained in Article 21 of Universal Declaration of Human Rights, 1948, Articles 25 of International Covenants on Civil and Political Rights, 1966, and Articles 8 of International Covenants on Economic, Social and Cultural Rights, 1966.

Such provisions also appear in a number of specialized international instruments, including: International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (Articles 5 and 8), UNESCO Declaration on Race and Racial Prejudice, 1978 (Article 6), Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (Article. 11), Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981 (Article 1), and Convention on the Rights of the Child, 1989 (Article 13)⁴¹⁵.

Participation must be meaningful and not merely symbolic, and recognize, for instance, that minorities are commonly underrepresented and that their concerns may not be adequately addressed.⁴¹⁶ The participation of women belonging to minorities is of particular concern.⁴¹⁷

During its second session, on 12th and 13th November 2009, the Forum on Minority Issues focused on minorities and effective political participation, a key reference for the session was article 2(2) of the UN Minorities Declaration, 1992 which provides for the right of persons belonging to national or ethnic, religious and linguistic minorities ‘to participate effectively in cultural, religious, social, economic and public life.’⁴¹⁸

⁴¹⁵“Minority Rights International Standard and Guidance for Implementation”. United Nation. 2010. http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf

⁴¹⁶UN Office of the High Commissioner for Human Rights, Towards Developing Country Engagement Strategies on Minorities: An Information Note for OHCHR Staff and Other Practitioners. www.ohchr.org/Documents/Publications/Strategies_on_minoritiesEN.pdf.

⁴¹⁷“Minority Rights International Standard and Guidance for Implementation” .United Nation. 2010. http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf

⁴¹⁸“Promoting Minorities Rights: A Guide for Advocates” .United Nation Office of the Commission for Human Rights. 2012. http://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf

(4) Right to association

Persons belonging to minorities have the right to establish and maintain their own associations. They have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties; Articles 2(4) and 2(5).

Provisions related to right to association are also contained in Article 20 of Universal Declaration of Human Rights, 1948, Article 22 of International Covenants on Civil and Political Rights, 1966 and, Article 8 of International Covenants on Economic, Social and Cultural Rights, 1966.

Such provisions also appear in a number of specialized international instruments, including: International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (Article 5), Convention on the Elimination of All Forms of Discrimination against Women, 1979 (Article 7), and Convention on the Rights of the Child, 1989 (Article 15).⁴¹⁹

(5) No discrimination and no disadvantage

The right of not to be discriminated against is paramount in protecting the rights of persons belonging to minorities in all regions of the world. Minorities everywhere experience direct and indirect, de jure and de facto discrimination in their daily lives.⁴²⁰ Non-discrimination and equality before the law are two of the basic principles of international human rights law. The principle of non-discrimination prohibits any distinction, exclusion, restriction or preference which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁴²¹

⁴¹⁹“Minority Rights International Standard and Guidance for Implementation”. United Nation. 2010. http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf

⁴²⁰“Promoting Minorities Rights: A Guide for Advocates”. United Nation Office of the Commission for Human Rights. 2012. http://www.ohchr.org/Documents/Publications/HR-PUB-12-07_en.pdf

⁴²¹Ibid.

Persons belonging to minorities may exercise their rights, including those set forth in UN Minorities Declaration, 1992, individually as well as in community with other members of their group, without any discrimination. No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in this Declaration (Article 3).

Non-discrimination provisions are also contained in Articles 1 and 55 of United Nations Charter, 1945, Article 2 of Universal Declaration of Human Rights, 1948, Articles 2, 4, 20, 24 and 26 of International Covenants on Civil and Political Rights, 1966, and Article 2 of International Covenants on Economic, Social and Cultural Rights, 1966.

Such provisions also appear in a number of specialized international instruments, including: ILO Convention concerning Discrimination in Respect of Employment and Occupation No. 111, 1958 (Article 1), International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (Article 1), UNESCO Convention against Discrimination in Education, 1960 (Article 1), UNESCO Declaration on Race and Racial Prejudice, 1978 (Articles 1, 2 and 3), Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (Article 2), Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981 (Articles 2, 4, 7, 8,), and Convention on the Rights of the Child, 1989 (Article 2),⁴²² allowing for temporary special measures which accelerate de facto equality between men and women.⁴²³

Similarly, the Human Rights Committee, in its general comment No. 18 (1989) on non-discrimination, held that States Parties are sometimes required to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination and ‘such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific

⁴²²“Minority Rights International Standard and Guidance for Implementation”. United Nation. 2010. http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf

⁴²³UN Office of the High Commissioner for Human Rights, Towards Developing Country Engagement Strategies on Minorities: An Information Note for OHCHR Staff and Other Practitioners. www.ohchr.org/Documents/Publications/Strategies_on_minoritiesEN.pdf.

matters as compared with the rest of the population... as long as such action is needed to correct discrimination in fact.’⁴²⁴

In its general recommendation No. 32 (2009), the Committee on the Elimination of Racial Discrimination provided further guidance on the scope of the principle of non-discrimination under Article 1(1) of the Convention and, more importantly, the meaning of ‘special measures.’⁴²⁵

3. Responsibilities of a state

As provided in UN Minorities Declaration 1992, for full realization of the rights of the minorities, the States shall:

- (1) take measures to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law; Article 4(1).
- (2) take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards; Article 4(2).
- (3) take appropriate measures so that persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instructions in their mother tongue; Article 4(3).
- (4) take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole; Article 4(4).

⁴²⁴“Minority Rights International Standard and Guidance for Implementation”. United Nation. 2010. http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf

⁴²⁵Ibid.

- (5) consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development in their country; Article 4(5).
- (6) plan and implement national policies and programmes of cooperation and assistance with due regard for the legitimate interests of persons belonging to minorities; Article 5.
- (7) cooperate on questions relating to persons belonging to minorities, inter alia , exchanging information and experiences, in order to promote mutual understanding and confidence; Article 6.
- (8) promote respect for the rights set forth in the Declaration; Article 7.
- (9) ensure that the effective enjoyment of the rights of the minorities shall not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights; Article 8.

4. Implementation mechanism

In order to implement the rights of persons belonging to minorities as enunciated in the International Conventions, various Committees have been established to monitor the progress made by States Parties in fulfilling their obligations, in particular, in bringing national laws as well as administrative and legal practices into line with their provisions of International Law.

The Committees which are of particular relevance to the implementation of minority rights are (a) the Committee on Human Rights which oversees implementation of the International Covenant on Civil and Political Rights; (b) the Committee on Economic, Social and Cultural Rights which oversees implementation of the International Covenant on Economic, Social and Cultural Rights; (c) the Committee on the Elimination of Racial Discrimination which oversees implementation of the Convention on the Elimination of All Forms of Racial Discrimination; and (d) the Committee on the Rights of the Child which oversees implementation of the Convention on the Rights of the Child.

States Parties undertake to submit Periodic Reports to the respective Committees outlining the legislative, judicial, policy and other measures, which they have taken

to ensure the enjoyment of, inter alia, the minority-specific rights contained in the relevant instruments. When a State Party report comes before the respective Committee for examination, representatives of the State Party concerned may introduce it, answer questions from the expert members of the Committee, and comment on the observations made. The Committees provide States Parties with a detailed set of reporting guidelines specifying the type of information required for the Committees to monitor a State Party's compliance with its obligations.

For reporting under Article 27 of the International Covenant on Civil and Political Rights, 1966 for example, information contained in the Report must be provided about minorities in a State Party, their respective numbers as compared to the majority and the concrete measures adopted by the reporting State Party to preserve minorities' ethnic, religious, cultural and linguistic identity as well as other measures to provide minorities with equal economic and political opportunities and a particular reference should also be made to their representation in central and local government bodies.

On the basis of the information they receive, the Committees can insist on a genuine dialogue with the reporting State Party. Once consideration of a State Party report has been concluded, the Committees issue 'Concluding Observations' which may state that violations of the rights of minorities have taken place, urge State Parties to desist from any further infringements of the rights in question, or call on the respective Governments to adopt measures to improve the situation.

(1) High Commissioner for Human Rights

The High Commissioner for Human Rights - the post was established in 1993 by the General Assembly - has been entrusted with the task, among others, to promote and protect the rights of persons belonging to minorities and to continue to engage in a dialogue with Governments concerned for that purpose.

Under the Office of High Commissioner, a comprehensive three-pronged programme has been elaborated to:

- (a) promote and implement the principles contained in the Declaration on the Rights of Persons belonging to Minorities;

- (b) cooperate with other organs and bodies of the United Nations, including the international human rights community, and programmes of technical assistance and advisory services; and
- (c) engage in dialogue with Governments and other parties concerned with minority issues.

The High Commissioner further contributes to strengthening minority protection by providing guidance in respect of, and support to, the activities of the other bodies and organs of the United Nations. This includes, among others, the follow-up of minority-related resolutions and recommendations of the international treaty bodies, or the Working Group on Minorities, and of the Special Rapporteurs.

(2) Working Group on Minorities

In 1995, a five-member Working Group on Minorities of the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities was established, initially for a three-year period, in order to promote the rights as set out in the Declaration on persons belonging to minorities, and in particular to:

- (a) review the promotion and practical realization of the Declaration;
- (b) examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and Governments; and
- (c) recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.

(3) Investigations and technical assistance

The independent experts appointed by the United Nations to investigate and report on the human rights situation in specific countries, as well as thematic issues, often address concerns pertaining to the rights of persons belonging to minorities or confronted with violations of minority rights. The conclusions and recommendations of these special rapporteurs are published and debated, bringing

the issues they address to international attention and serving either as guidance for the Governments concerned or as a means of pressure to ease or eliminate the problems which have been identified

.

(4) Complaints procedures

Complaints against the violation of human rights, including minority-specific rights, can be brought to the attention of the United Nations. An individual, a group or a State Party under a number of procedures including, may submit complaints:

- (a) the confidential 1503 Procedure that allows a working group of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, and ultimately the Economic and Social Council, to receive communications pertaining to situations that constitute a ‘consistent pattern of gross violations’ of human rights, including those of particular importance to minorities. Individuals or groups who claim to be victims of violations, or a person or group of people with direct, reliable knowledge of such violations (including NGOs) may submit communications;
- (b) the ICCPR which provides for State to State Party complaints under Article 41, if the State Party has recognized the competence of the Committee on Human Rights to receive and consider such complaints. In this case, the Committee may consider communications to the effect that a State Party claims that another State Party is not respecting the rights set out in the Covenant;
- (c) the Optional Protocol to the ICCPR which provides for individual communications alleging violations of the Covenant to be submitted to the Human Rights Committee on violations perpetrated by a State Party of any of the articles contained therein;
- (d) the Convention on the Elimination of Racial Discrimination also permits communications from individuals or groups who claim to be victims of a violation of their rights as set out in the Convention, and for state-to-state complaints under article 11 of the Convention; and
- (e) complaints procedures available under the Convention against Torture, and those established by other specialized agencies, in particular by the

International Labour Organization and the United Nations Educational, Scientific and Cultural Organization.

(5) Early warning mechanisms

Early warning mechanisms have been set up in order to prevent, *inter alia*, racial, ethnic or religious tensions from escalating into conflicts. Two types of provisions for early warning mechanisms established by the United Nations deserve to be mentioned in the context of minority protection:

- (a) the High Commissioner for Human Rights has been entrusted with the specific task to play a mediating role in situations which may escalate into conflicts by acting at the diplomatic level to obtain substantive results with individual Governments and by encouraging dialogue among the parties concerned;
- (b) the Committee on the Elimination of Racial Discrimination has established an early-warning mechanism drawing the attention of the members of the Committee to situations, which have reached alarming levels of racial discrimination. The Committee has adopted both early-warning measures and urgent procedures to prevent, as well as to respond, more effectively to violations of the Convention. Criteria for early warning measures could, for example, include the following situations:
 - i. the lack of an adequate legislative basis for defining and prohibiting all forms of racial discrimination; inadequate implementation of enforcement mechanisms;
 - ii. the presence of a pattern of escalating racial hatred and violence or appeals to racial intolerance by persons, groups or organizations; and
 - iii. significant flows of refugees or displaced persons resulting from a pattern of racial discrimination or encroachment on the lands of minority communities.

(6) Role of Non-Governmental Organizations

International non-governmental organizations (NGOs) play an important role in promoting and protecting the rights of persons belonging to minorities. They act

either directly or through their national affiliates that are close to situations of tension and possible sources of conflict. NGOs have a significant impact in the field of minority protection through research, the publishing of reports and by serving as channels and platforms for minority groups and by providing timely and factual information to governmental and intergovernmental bodies on situations involving minorities.

Part III
UN HUMAN RIGHTS ENFORCEMENT SYSTEM

Chapter Sixteen

UNITED NATIONS ENFORCEMENT SYSTEM

1. Introduction

The term ‘human rights’ was mentioned seven times in the UN Charter making the promotion and protection of human rights a key purpose and guiding principle of the Organization. The protection and effectiveness of human rights, evolved from within the UN system, to a great degree, depends on UN’s ability to enforce these rights but the very concept of ‘enforcement’ in the UN Charter relates only to the enforcement of the decision of the Security Council⁴²⁶ and no such specific enforcement mechanism like use of force or sanctions is available to enforce the human rights enshrined even in UN instruments.

‘Enforcement’ means use of all means intended and proper to induce respect for human rights.⁴²⁷ The monitoring and enforcement arrangements of the UN Human Rights (Human Rights originating from UN instruments) have a ‘two-track’ approval:

(1) **Charter-based organs** including those (a) whose creation is directly mandated by the UN Charter, such as the General Assembly and the Human Rights Council (as the successor to the Commission on Human Rights) and which have been especially authorized by one of those bodies, such as the Sub-Commission on the Promotion and Protection of Human Rights, and the Commission on the Status of Women; and

(2) **Treaty-based organs** such as the Human Rights Committee formed under the International Covenant under Civil Political Rights, referred to in this book as the ‘ICCPR Committee’. It is different from the UN Human Rights Council that is identified as the ‘UN Council,’ which has been created for a range of other human rights Treaties originating in UN processes. These organs are intended to monitor compliance by states with their obligations under those Treaties.

2. Charter-based organs

Human rights organs and institutions are of two types:

- (i) Organs created by Charter itself; and
- (ii) Institutions constituted by organs created by the Charter.

⁴²⁶ Article 45 of UN Charter

⁴²⁷ Rudolf Bernhardt. ‘General Report in Bernhardt and Jolowioz (eds), International Enforcement of Human rights (1985), at page 5

The ‘Principal Organs’ created by the Charter of UN (1945) are: (I) Security Council; (ii) General Assembly; (iii) Economic and Social Council (ECOSOC); (iv) Trusteeship Council; (v) Secretariat; and (vi) International Court of Justice.

The Trusteeship Council suspended its work in 1994 after completing the post-World War-II de-colonization process. The ECOSOC in the past has played a role as an intermediary between the General Assembly and the Commission on Human Rights but now its role has been bypassed by the creation in 2006 of the UN Human Rights Council and this Council directly reports to the General Assembly.

1) **Security Council**

The role of the Security Council with reference to protection of human rights has expanded in the wake of end of the cold war between the blocks of nation states led by the United States of America and erstwhile Union of Socialist Soviet Republics. Increasingly, it is playing a significant role in matters, including, such as inclusion of provisions related to the human rights in peace agreements and eliminating the use of children in armed conflicts and it is moving towards concept of ‘responsibility to protect.’

The role of Security Council in the elimination of apartheid in South Africa is very positive but it failed in stopping the genocide in Bosnia and especially in Rwanda where 800,000 people were killed in about 100 days, one of the most abhorrent events of the human history. However, the whole system of the Security Council is paralyzed by the veto power held by five permanent Members (USA, UK, France, Russia and China) out of total fifteen members.⁴²⁸

In the more than three decades since, gross violations of the most fundamental human rights, including genocide, war crimes, and crimes against humanity, have featured prominently in Council deliberations on situations of inter- and intra-state conflict. The growing prominence of human rights, particularly over the past 30 years, has fundamentally changed the concept of state sovereignty and international security at the UN. Gross violations of human rights have been now defined as threats to international peace and security; stopping mass slaughter has become a legitimate purpose of military force; and the criminal prosecution of the architects of mass atrocity crimes has become a subject of Council debate. Indeed, the Security Council now contributes to limited human rights protection by advocating for the fulfilment of international humanitarian and international human rights law during deliberations, in presidential statements and resolutions, through

⁴²⁸ The Role of the UN Security Council in Protecting Human Rights: *Prospects and Challenges*; Expert Workshop, 6 June 2012, German Institute for Human Rights, Zimmerstraße 26/27, Berlin

the selective use of humanitarian intervention, and the creation of, and referral to, international courts and tribunals.⁴²⁹

Many United Nations peace keeping operations and political and peacebuilding missions also include the human rights-related mandates aimed at contributing to the protection and promotion of human rights through both immediate and long-term action. Human rights teams on the ground work in close cooperation and coordination with other civilian and uniformed components of peace operations, in particular, in relation to the protection of civilians; addressing conflict-related sexual violence and violations against children; and strengthening respect for human rights and the rule of law through legal and judicial reform, security sector reform and prison system reform.⁴³⁰

2) General Assembly

The General Assembly's Third Committee (Social, Humanitarian and Cultural) examines a range of issues, including human rights questions. The Committee also discusses questions relating to the advancement of women, the protection of children, indigenous issues, the treatment of refugees, the promotion of fundamental freedoms through the elimination of racism and racial discrimination, and the right to self-determination. The Committee also addresses important social development questions.⁴³¹

The Secretary General of the UN has also very important role. He appoints special representatives, who advocate against major human rights violations:

- a) Special Representative of the Secretary General for Children and Armed Conflicts;
- b) Special Representative of the Secretary General on Sexual Violence in Conflict;
- c) Special Representative of the Secretary General on Violence against Children.

The Human Rights Up Front Initiative (HRuF) is a new initiative launched by the Secretary-General in 2013 to ensure that the UN system takes early and effective action, as mandated by the Charter or UN resolutions, to prevent or respond to serious and large-scale violations of human rights or international humanitarian law. The HRuF underlines a shared responsibility among the various UN entities to work together to address such violations and seeks to achieve this by effecting change at three levels: cultural, operational and political. These changes

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<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23475&LangID=E>

⁴³⁰ <http://www.un.org/en/sections/what-we-do/protect-human-rights/>

⁴³¹ <http://www.un.org/en/sections/what-we-do/protect-human-rights/>

are gradually transforming the way the UN understands its responsibilities and implements them. The Secretary-General and Deputy Secretary-General have presented HRuF through various presentations, letters and policy documents, to the General Assembly and to staff and UN system leaders.

3) Office of United Nations High Commissioner for Human Rights

The proposal to establish the office of the High Commissioner for Human Rights was pending since long but it was approved in the Vienna World Conference on Human Rights in 1993. The General Assembly,⁴³² in its resolution on 'High Commissioner for The Promotion and Protection of All Human Rights' declared that the High Commissioner for Human Rights (commonly known as the Office of the High Commissioner for Human Rights (OHCHR) 'shall be a person of high moral standing and personal integrity and shall possess expertise and general knowledge and understanding of diverse cultures necessary for impartial, objective, non-selective and effective preference of the duties.'

The office is headed by the High Commissioner for Human Rights who shall be appointed by the Secretary-General of the UN and approved by the general Assembly with due regard to geographic nature and shall have a fixed term of five years. The OHCHR is a department of the UN Secretariat.

The OHCHR has to co-ordinate human rights activities throughout the UN system and it acts as the secretariat of the Human Rights Council in Geneva. It is accountable to the Secretary-General and advises the Secretary-General on the policies of the United Nations in the area of human rights and represents the Secretary-General at meetings of human rights organs and at other human rights events, and carries out special assignments as decided by the Secretary-General. HCHR is the UN official with principal responsibility for UN human rights activities under the direction and authority of the Secretary-General with the overall competence of the General Assembly and ESOSOC and Human Rights Council.

The objectives of OHCHR are to:

- a) Promote universal enjoyment of all human rights by giving practical effect to the will and resolve of the world community as expressed by the United Nations;
- b) Play the leading role on human rights issues and emphasize the importance of human rights at the international and national levels;
- c) Promote international cooperation for human rights;

⁴³² 1.Vide its Resolution No. 48/141 (1993)

- d) Stimulate and coordinate action for human rights throughout the United Nations system;
- e) Promote universal ratification and implementation of international standards;
- f) Assist in the development of new norms of human rights;
- g) Support human rights organs and treaty monitoring bodies;
- h) Respond to serious violations of human rights;
- i) Undertakes preventive human rights actions;
- j) Promote the establishment of national human rights infrastructures;
- k) Undertake human rights field activities and operations;
- l) Provide education, information advisory services and technical assistance in the field of human rights;
- m) Promote and protect the realization of the right to development and to enhance support from relevant bodies of the United Nations system for this purpose;
- n) Coordinate relevant United Nations education and public information programs in the field of human rights;
- o) Engage in a dialogue with all Governments in the implementation of his/her mandate with a view to securing respect for all human rights;
- p) Enhance international cooperation for the promotion and protection of all human rights;
- q) Coordinate the human rights promotion and protection activities throughout the United Nations System and rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights with a view to improving its efficiency and effectiveness; and
- r) Provide, through the Centre for Human Rights of the Secretariat and other appropriate institutions, advisory services and technical and financial assistance, at the request of the State concerned and, where appropriate, the regional human rights organizations, with a view to supporting actions and programs in the field of human rights.

4) International Court of Justice

The contribution of ICJ to human rights promotion and protection was scarcely noticeable, but this mood of the court has gradually changed over the years with a series of rulings where the Court emphasized international human rights and humanitarian law. The following factors can be considered to understand the minimal role of ICJ:

- a) The ICJ was never intended to function as a human rights court nor was it ever structured as one as opposed to the European Court of Human Rights or Inter-American Court of Human Rights;
- b) The Court's slow recognition of human rights can be explained partly by the fact that international human rights law itself did not exist as such prior to

1945, except for international labour law. During the 1950s and 1960s, the ICJ could hardly apply international human rights law that was still at a very early stage of normative development;

- c) The ICJ was reticent to adopt a more activist stance, even after international human rights law had become much more established in content and legal status;
- d) Many Judges might have been out-of-touch with the growing international human rights movement of the early 1960s;

The Court avoided pronouncing upon a major human rights issue in its 1966 ruling in the South West Africa case wherein Liberia and Ethiopia alleged that South Africa's apartheid policy violated its responsibilities under the League of Nations mandate which continued under the UN Charter's Trusteeship system. The court dismissed the case on grounds that neither Ethiopia nor Liberia had a material interest in the issue. Since 2004, however, ICJ seems to signal willingness to apply established norms of international human rights and humanitarian law in disputes brought before it. For example:

- a) In 2004, the ICJ ruled in an advisory opinion on the legal consequences arising from a wall that Israel constructed in Palestinian territory under Israeli occupation, that Israel violated several important provisions of the Fourth Geneva Convention, 1949, and of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as of the UN Convention on the Rights of the Child;
- b) In the 2009 Ahmedou Sadio Diallo Case, brought by Guinea against the Democratic Republic of Congo, the ICJ used the UN Human Rights Committee's jurisprudence to find violations of both the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, as well as the Vienna Convention on Consular Relations;
- c) Belgium brought a case against Senegal to ensure that Belgium's rights under the UN Convention against Torture were fulfilled by Senegal, also a party to the Convention. Belgium prayed that Hissène Habré, former President of Chad allegedly responsible for perpetrating serious violations of the human rights of tens of thousands, would either be prosecuted for these crimes or extradited to another country for prosecution. The ICJ found that Senegal had breached its obligations under the UN Torture Convention, and 'that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to

its competent authorities for the purpose of prosecution, if it does not extradite him.’⁴³³

5) Commission on the Status of Women

The Commission on the Status of Women (CSW) is a functional commission of the Economic and Social Council (ECOSOC). It was established by the ECOSOC in 1946. It is the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women. In 1996, ECOSOC expanded the CSW so that it takes a leading role in monitoring and reviewing progress and problems in the implementation of the Beijing Declaration and Platform for Action, and in mainstreaming a gender perspective in UN activities. Furthermore, under 2030 Agenda for Sustainable Development 2015, the Commission will also contribute to the follow-up to the 2030 Agenda for Sustainable Development so as to accelerate the realization of gender equality and the empowerment of women.

It has 45 members who are representatives of Member States elected by ECOSOC on the basis of equitable geographical distribution: 13 members from Africa; 11 from Asia; 9 from Latin America and Caribbean; 8 from Western Europe and other States and 4 from Eastern Europe. Members are elected for four-year terms. It is a very active Commission and among its activities, the CSW has drafted several conventions and declarations, including the Declaration on the Elimination of Discrimination against Women in 1967, and women-focused agencies such as UNIFEM and INSTRAW.

The CSW holds annual two-week session of representatives of UN Member States, civil society organizations and UN entities at UN headquarters in New York. They discuss progress and gaps in the implementation of the 1995 Beijing Declaration and Platform for Action, which is the key global policy document on gender equality. Member States agree on further actions to accelerate progress and promote women’s enjoyment of their rights in political, economic and social fields. The outcomes and recommendations of each session are forwarded to ECOSOC for follow-up. UN Women supports all aspects of the Commission’s work.

The CSW adopts programmes to appraise progress and make further recommendations to accelerate the implementation of the Platform for Action. Under its existing methods of work, established in 2015, at each session the CSW:

⁴³³ <http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/commentary/the-international-court-of-justices-growing-contribution-to-human-rights-and-humanitarian-law/>

- a) Holds a ministerial meeting to reaffirm and strengthen political commitment to the realization of gender equality and the empowerment of women and girls as well as their human rights and to ensure high-level engagement and the visibility of the deliberations of the Commission;
- b) Engages in general discussion on the status of gender equality, identifying goals attained, achievements made and efforts under way to close gaps and meet challenges in relation to the priority theme and the review theme;
- c) Considers one priority theme, based on the Beijing Declaration and Platform for Action and the outcomes of the 23rd special session of the General Assembly and possible linkages to the 2030 Agenda for Sustainable Development;
- d) Evaluates progress in implementing agreed conclusions from previous sessions as a review theme;
- e) Addresses emerging issues, trends, focus areas and new approaches to questions affecting the situation of women, that require timely consideration;
- f) Plays a catalytic role for gender mainstreaming in the United Nations system and contributes gender perspectives to the work of other intergovernmental processes and functional commissions;
- g) Considers in closed meeting the report of its Working Group on Communications; and
- h) Agrees on further actions for the promotion of gender equality and the empowerment of women by adopting agreed conclusions and resolutions.⁴³⁴

6) UN Human Rights Council

The Human Rights Council, by a Resolution of the General Assembly replaced, the UN Commission on Human Rights in 2006.⁴³⁵ The dissatisfaction of various stakeholders like developing states, NGOs etc. led to the demise of the Commission and creation of the Council but as a result of yearlong and heavy negotiations on the principles, approaches, composition, functions, procedures etc. of the proposed Council.

The General Assembly Resolution decided that the work of the Council shall be guided by the principles of universality, impartiality, objectivity, non-selectivity, constructive international dialogue and cooperation with a view to enhancing the promotion and protection of all human rights including rights to development.

The Resolution gave the following mandate to the Council:

⁴³⁴ <http://www.unwomen.org/en/csw>

⁴³⁵ 3.UN Resolution No. 60/151/(2006)

- a. Promote human rights education and learning as well as advisory services, technical assistance and capacity building;
- b. Serve as a forum for dialogue on thematic issues on all human rights;
- c. Make recommendations to the General Assembly for the further development of international law in the field of human rights;
- d. Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;
- e. Undertake a Universal Periodic Review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States;
- f. Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;
- g. Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights;
- h. Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;
- i. Make recommendations with regard to the promotion and protection of human rights;
- j. Submit an annual report to the General Assembly.

The Council consists of forty-seven Member States, which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly. The membership shall be based on equitable geographical distribution, and seats shall be distributed as follows among regional groups: (i) Group of African States, 13; (ii) Group of Asian States, 13; (iii) Group of Eastern European States, 06; (iv) Group of Latin American and Caribbean States, 08; and (v) Group of Western European and other States, 07. The members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms.

The Council shall be open to all Member States of the United Nations. When electing members of the Council, member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments towards human rights. The General Assembly, by a two-thirds majority of the members present and voting, may

suspend the right of membership in the Council of a member of the Council that commits gross and systematic violations of human rights.

Its headquarters is in Geneva, Switzerland. The UNHRC holds regular sessions three times a year, in March, June, and September; however, it can decide at any time to hold a special session to address human rights violations and emergencies, at the request of one-third of the member states.

The Sub-Commission on the Promotion and Protection of Human Rights was the main subsidiary body of the Human Rights Commission. The Sub-Commission was composed of 26 elected human rights experts whose mandate was to conduct studies on discriminatory practices and to make recommendations to ensure that racial, national, religious, and linguistic minorities are protected by law. In 2006, the newly created UNHRC assumed responsibility for the Sub-Commission. In 2007, the UNHRC decided to create an Advisory Committee to provide expert advice with 18 members, distributed as follows: 05 from African states; 05 from Asian states; 03 from Latin American and Caribbean states; 03 from Western European and other states; and 02 members from Eastern European states.

The UNHRC complaint procedure was established in 2007, for reporting of consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms in any part of the world and under any circumstances. The UNHRC has set up two working groups for its Complaint Procedure:

- a) Working Group on Communications (WGC) - consists of five experts designated by the Advisory Committee from among its members, one from each regional group. The experts serve for three years with the possibility of one renewal. The experts determine whether a complaint deserves investigation, in which case it is passed to the WGS.
- b) Working Group on Situations (WGS) - has five members, appointed by the regional groups from among its members on the Council for one year, which is renewable once. The WGS meets twice a year to examine the communications transferred to it by the WGC, including the replies of states thereon, as well as the situations which are already before the UNHRC under the complaint procedure. The WGS, on the basis of the information and recommendations provided by the WGC, presents the UNHRC with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and makes recommendations to the UNHRC on the course of actions to take.

The Chairman of the WGC screens complaints for admissibility. To be accepted complaints must:

- a) be in writing and has to be submitted in one of the six UN official languages;

- b) contain a description of the relevant facts (including names of alleged victims, dates, location and other evidence), with as much detail as possible;
- c) not be manifestly politically motivated;
- d) not be exclusively based on reports disseminated by mass media;
- e) not be already dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights.
- f) be after domestic remedies have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.
- g) not use a language that is abusive or insulting.

Individuals or groups or organizations can claim to be victims of human rights violations or that have direct, reliable knowledge of such violations; however, complaints by a single victim of a single incident will not be accepted. Complaints can be regarding any state, regardless of whether it has ratified a particular treaty. Following the initial screening, a request for information will be sent to the State concerned, which shall reply within three months. WGS will then report to the UNHRC, which will usually be in the form of a draft resolution or decision on the situation referred to in the complaint. The UNHRC will decide on the measures to take in a confidential manner.

In addition to the UPR, the Complaints Procedure and the Advisory Committee, the UNHRC's other subsidiary bodies include:

- a. Expert Mechanism on the Rights of Indigenous Peoples;
- b. Forum on Minority Issues; and
- c. Social Forum, established as a space for dialogue between the representatives of Member States, civil society, and intergovernmental organizations on issues linked with human rights.

The UNHRC adopts 'Special procedures,' that are mechanisms to gather expert observations and advice on human rights issues. Special procedures are categorized as either thematic mandates, which focus on major phenomena of human rights abuses worldwide, or country mandates, which report on human rights situations in specific countries or territories. Special procedures can be either individuals (called 'special rapporteurs' or 'independent experts'), who are independent experts in a particular area of human rights, or working groups, usually composed of five members (one from each UN region). The mandates of the special procedures are established and defined by the resolution of UNHRC creating them.

3. Treaty Bodies

The UN human rights Conventions are operationalized through a number of treaty bodies that are distinct from Charter-based rights bodies. The treaty bodies derive their existence from provisions contained in a specific legal instrument; these hold narrower mandates, only about the set of issues mentioned in the legal instrument; they address a limited audience; they deal with only those countries that have ratified the legal instrument; and they base their decision-making on consensus.

The 10 (ten) UN human rights conventions have monitoring bodies to oversee the implementation of the treaty provisions. The treaty bodies are composed of independent experts and these meet to consider States Parties' reports as well as individual complaints or communications. They may also publish general comments on human rights topics related to the treaties they oversee.

The Secretary-General of the UN has issued a 'Compilation of guidelines on the form and content of reports to be submitted by States Parties to the international human rights treaties.' This document provides complete details on the reporting requirements, including the core document, and treaty-specific documents.

The Committees may also issue general comments on thematic issues. The guidelines for these have been issued in 'International human rights instruments: Compilation of General Comments and General Recommendations adopted by human rights treaty bodies.'

The basic functions of the committees are:

- 1) **Review state party reports:** Every member State is periodically required under the relevant treaty to report to the relevant Committee on the steps it has taken to give effect to every provision of each treaty to which it is a party.
 - a) Country reports also provide an opportunity for States Parties to dialogue directly with Committees.
 - b) At the end of their examination of the reports, the Committee adopts 'Concluding Observations' that contain recommendations on how the State Party can improve implementation of the treaty at their domestic level;
- 2) **Consider individual complaints and develop jurisprudence:** Individuals under the jurisdiction of a State Party who believe that State has violated provisions of a treaty are entitled to send communications to the relevant Committee on the basis that individual human rights cannot be said to be meaningfully guaranteed unless persons whose rights have been violated have the right to complain to an international authority. The decisions that treaty bodies have reached on individual communications are referred to as 'views' and represent an impressive body of jurisprudence.

- a) Eight of the ten treaty bodies can receive individual complaints i.e., Committees of CAT, ICERD, CMW and CED) or by ratifying a protocol (the Optional Protocols of the ICCPR, CEDAW, ICRPD, and ICESCR. This function is restricted because States must not only have ratified the treaty but must also declare they recognize the Committee's competence to receive and consider such communications.
 - b) In addition to the above-mentioned individual complaints, interstate complaints, which have never been used, are also allowed under the following treaty provisions: Articles 21 and 30 of CAT; Articles 74 and 92 of CMW; Article 10 of Optional Protocol to the ICESCR; Article 12 of Optional Protocol on a communication procedure to the CRC; Articles 11 to 13 and 22 of ICERD; Article 41 to 43 of ICCPR; Article 29 of CEDAW, and Article 32 of CED.
- 3) Interpret human rights treaty provisions:** The treaty bodies, through General Comments and Statements, clarify the scope and meaning of treaty provisions; and thus, they significantly contribute to the meaningful development of the content of human rights and substantive reporting obligations of the States Parties.
- 4) Prevent human rights violations:** Six Committees are empowered to conduct inquiries on their own if serious or systematic human rights violations are alleged to have occurred in the territory of a State Party if they receive reliable information containing well-founded indications that a State Party has seriously or systematically violated a right contained in the convention it monitors.
- a) The above mentioned six Committees are (i) the CAT (under Article 20, CAT), (ii) CEDAW (Article 8, Optional Protocol to CEDAW), (iii) CRPD (Article 6, Optional Protocol to CRPD), (iv) CED (Article 33, CED), (v) CESC (Article 11, Optional Protocol to ICESCR) and (vi) CRC (Article 13, Optional Protocol to CRC on a communications procedure).
 - b) The Subcommittee on Prevention of Torture has a preventive mandate. It does not perform the same functions as the other nine treaty bodies; however, it is mandated to visit places of detention and advise National Preventive Mechanisms but it does not examine individual complaints or periodic reports by States Parties.
 - c) The CERD has developed early-warning measures and urgent procedures. Its early warning measures aim to prevent problems from escalating into conflicts with an aim to prevent or limit the scale or number of serious Convention violations.
 - d) The CED may resort to urgent action procedures to prevent specific human rights violations. The Article 30 of CED seeks to prevent enforced

disappearance by requesting the State Party to provide information about a disappeared person ‘as a matter of urgency.’ Under Article 34 the Committee ‘may, after seeking from the State Party concerned all relevant information and on well-founded indications that enforced disappearance is being practiced on a widespread or systematic basis, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General.’⁴³⁶

The treaty bodies and their mandates are:

- 1) **Human Rights Committee or ICCPR Committee** is established under Article 28 of the International Covenant on Civil and Political Rights.
 - a. It meets in New York and Geneva every year since 1977.
 - b. The committee consists of eighteen members of the nationals of States Parties who ‘shall be person of high moral character and recognized competence in the field of human right.’
 - c. In the election of the Committee, consideration shall be given to the ‘equitable geographical distribution of membership and to the representative of the different civilizations and principal legal systems.’⁴³⁷
 - d. The members shall be selected and serve in their personal capacity.⁴³⁸ It has four main functions:⁴³⁹ (i) consideration of State’s reports; (ii) adoption of general comments; (iii) examination of communications (complaints); and (iv) an interstate complaints procedure.
- 2) **Committee on Economic, Social and Cultural Rights (CESCR)** is established in 1985, under International Covenant on Economic, social and Cultural Rights 1976.⁴⁴⁰
 - a. It oversees the implementation of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol.
 - b. The Committee meets in two sessions each year in Geneva since 1987.
 - c. Its functions are similar to the functions of Human Rights Committee.

⁴³⁶ <https://www.geneva-academy.ch/joomlatools-files/docman-files/Optimizing%20UN%20Treaty%20Bodies.pdf>

⁴³⁷ Article 31

⁴³⁸ Article 28

⁴³⁹ Article 40 and 41 of International covenant on Civil and Political Rights

⁴⁴⁰ All such committees are on the pattern of Human Rights or ICCPR Committee.

- 3) **Committee on the Elimination of Racial Discrimination (CERD)** is established pursuant to article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination.
 - a. It monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination and its optional protocol.
 - b. It meets in two sessions each year in Geneva since 1970.
 - c. There are several procedures around which documents are considered by CERD: State Party reports, early warning, inter-state complaints, individual complaints, general comments, and thematic discussions.

- 4) **Committee on the Elimination of Discrimination against Women (CEDAW)** monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women and its optional protocol.
 - a. It is established pursuant to Article 17 of the Convention. It meets in two sessions each year in Geneva since 1982.
 - b. The CEDAW considers: State Party reports, individual complaints, inquiries into situations, and general recommendations.

- 5) **Committee against Torture (CAT)** monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
 - a. It is established in accordance with Article 17 of the Convention.
 - b. It meets in two sessions each year in Geneva since 1988.
 - c. The CAT considers: State Party reports, individual complaints, inquiries into situations.

- 6) **Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)** has a preventive mandate derived from the Optional Protocol to the Convention against Torture (OP-CAT).

- 7) **Committee on the Rights of the Child (CRC)** monitors the Convention on the Rights of the Child and its optional protocols.
 - a. It is established pursuant to Article 43 of the Convention.
 - b. It meets in three sessions each year in Geneva 1991.
 - c. The CRC considers State party reports, issues general comments, and holds general discussions.
 - d. An Optional Protocol opened for signature in 2012, will allow the CRC to hear individual complaints.

- 8) **Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)** monitors the implementation of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
 - a. It is established pursuant to Article 72 of the Convention. It meets in two sessions each year in Geneva since 2004.
 - b. It considers State Party reports, issues general comments, and can hold general discussions.
 - c. When 10 State Parties have made the necessary declaration under Article 77, the CMW may consider individual complaints.
- 9) **Committee on the Rights of Persons with Disabilities (CRPD)** monitors the implementation of the Convention on the Rights of Persons with Disabilities and its optional protocol.
 - a. It is established pursuant to Article 34 of the Convention.
 - b. It meets in two sessions each year in Geneva since 2009.
 - c. It considers State party reports, and holds general discussions.
 - d. The CRPD may consider individual complaints in accordance with the optional protocol.
- 10) **Committee on Enforced Disappearances (CED)** monitors the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance.
 - a. It is established by article 26 of the Convention.
 - b. It meets in two sessions each year in Geneva since 2011.
 - c. The CED considers State party reports and individual complaints.

4. Challenges to Monitoring System

A number of challenges confront the treaty body monitoring system in terms of its effectiveness, efficiency and coordination. They, among others include:

- 1) **Overload due to the system's growth:** The number of treaty bodies has doubled recently and growth is likely to continue. The ratifications are also growing. The effect is a considerable backlog in the consideration of reports.
- 2) **Non-compliance with reporting obligations:** Many states do not report to the Committees on time or do not report at all. According to a UN report

only 13 per cent of States Parties had fully met their reporting obligations on 19th January 2016.

- 3) **Inadequate resources:** The treaty bodies increasing workload has not been matched by a corresponding increase in resources, either in number of staff or level of expertise.
- 4) **Coherence:** The ten treaty bodies have developed their own working methods and procedures. Some work on similar issues without much coordination.
- 5) **Membership:** The ten treaty bodies are currently composed of many independent, part-time, and unpaid experts. National selection procedures and UN election processes lack the openness and transparency required to secure a suitably qualified and competent membership that is independent of government.
- 6) **Implementation:** Implementation of international human rights treaties and related treaty bodies recommendations and decisions is jeopardized by a number of factors, including states' non-compliance, the weakness of the diverse follow-up procedures adopted by Committees, lack of access to treaty bodies' work, and their low visibility.⁴⁴¹

5. Mechanisms and Procedures

The Human Rights Council is a new organization, setup in 2006, to remedy the perceived deficiencies of the Human Rights Commission. The Council has practically, with some amendments, followed the technique used by the Commission for responding to various violations of Human Rights. The procedures of the Commission and Council include:

1) Universal Periodic Review

Earlier the 1235 Procedure was established by Resolution No. 1235 of ESCOSOC in 1967, for the Human Rights Commission and the Procedure allowed an annual public debate on the gross violations of human rights and fundamental freedoms including policies of racial discrimination, segregation and apartheid in

⁴⁴¹ <https://www.geneva-academy.ch/joomlatools-files/docman/files/Optimizing%20UN%20Treaty%20Bodies.pdf>

all countries.⁴⁴² The Commission could examine the ‘situations, which reveal a consistent pattern of violations of human rights’ and report and make recommendations to the ECOSOC.

In other words, this Procedure authorized two things (a) holding of a public debate during annual session of the Commission wherein governments and NGO(s) are given opportunity to highlight country specific situation that merits the attention of the Commission; and (b) studying and investigating particular situations (or individual cases) through techniques and methods considered appropriate by the Commission. The Human Rights Council has adopted instead a new procedure called Universal Periodic Review (UPR).

This Human Rights Council peer review mechanism involves examining the human rights record of each UN member state according to a fixed and predictable schedule. Conducting a periodic review of this kind at the universal level is one of the foremost innovations brought about by the creation of the Council. The current periodicity of the UPR is four and a half years. Forty-two states are reviewed each year at three HRC sessions (i.e., 14 countries per session). These sessions are generally held in January/February, April/May and October/November.

The General Assembly has on the insistence of developing countries decided in the same Resolution (No.60) that the Council would undertake a Universal periodic Review (UPR) based on objective and reliable information of the fulfilment of the human rights obligations and comments of each state.

The UPR shall:⁴⁴³

- (a) Promote the universality, interdependence, indivisibility and interrelatedness of all human rights;
- (b) Be a cooperative mechanism based on objective and reliable information and on interactive dialogue;
- (c) Ensure universal coverage and equal treatment of all States;
- (d) Be an intergovernmental process, UN Member-driven and action oriented;
- (e) Fully involve the country under review;
- (f) Complement and not duplicate other human rights mechanisms, thus representing an added value;
- (g) Be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner;
- (h) Not be overly burdensome to the concerned State or to the agenda of the HRC;
- (i) Not be overly long; it should be realistic and not absorb a disproportionate amount of time or human and financial resources;

⁴⁴² Resolution 1235 (XLIII) 1967

⁴⁴³ 1.HRC Resolution 5/1 of 18 June 2007 and HRC decision 6/102 of 27 September 2007

- (j) Not diminish the HRC's capacity to respond to urgent human rights situations;
- (k) Fully integrate a gender perspective;
- (l) Take into account the level of development and specificities of countries;
- (m) Ensure the participation of all relevant stakeholders, including non-governmental organizations (NGOs) and national human rights institutions (NHRIs).

The objectives of the UPR include:

- (a) Improvement of the human rights situation on the ground;
- (b) Fulfilment of the state's human rights obligations and commitments and assessment of positive developments and challenges faced by the state;
- (c) Enhancement of the State's capacity and technical assistance;
- (d) Sharing of best practices among states and other stakeholders in consultation with and with the consent of the state concerned;
- (e) Support for cooperation in the promotion and protection of human rights;
- (f) Encouragement of full cooperation and engagement with the Council, other human rights bodies and the OHCHR.

The UPR is based on the commitments to human rights contained in the United Nations Charter, the Universal Declaration of Human Rights, and the international human rights instruments to which the states under review are party, and the voluntary commitments made by the states.

The UPR is a process comprising three stages:

- 1) An assessment of the human rights situation in the member state under review;
- 2) Between two reviews (4.5 years), implementation by the member state concerned of the recommendations given and voluntary pledges, if any, made;
- 3) At the next review, an account of the implementation of these recommendations and commitments and an assessment of the human rights situation in that country since the last UPR.

The review is conducted by a working group composed of the 47 Human Rights Council member states and involves an interactive dialogue. However, non-HRC member states (observer states) are allowed to participate in the review, including the dialogue segment.

The working group and the member state being reviewed are assisted by a group of three states serving as rapporteurs, known as the 'troika', being drawn by lots from among the Human Rights Council member states. The troika sends questions to the member state under review and after the review, ensures that the report summarizing the debates is correct and acceptable to all.

The UPR is based on three documents from three distinct sources:

- 1) The national report: The states present a national report (of no more than 20

pages) in the light of the ‘General Guidelines for the Preparation of Information under the Universal Periodic Review’ after a broad consultation process with all the relevant stakeholders at the national level;

- 2) A compilation of United Nations information: the OHCHR compiles a summary, no more than 10 pages long, of information deriving from official UN documents;
- 3) A stakeholders’ report: the OHCHR puts together a ten-page summary of information provided by all other relevant stakeholders including NGOs, defenders of human rights, or academic institutions.

The three and half hour (210 minutes) review proceeds as follows:

- 1) The member state presents its national report and its responses, if any, to the questions submitted in writing by other states.
- 2) This presentation is followed by an interactive dialogue: the other states ask questions and make recommendations on the human rights situation in the country concerned and the state may respond.
- 3) At the end of the dialogue, the country under review makes its final observations.

The country being reviewed is allocated 70 minutes speaking time and the other states 140 minutes. The outcome of the review is a report prepared by the troika with the involvement of the state under review and the assistance of the HRC Secretariat. The report contains complete list of the recommendations made. The period between two reviews is referred to as the follow-up and is the time given to the state under review to implement the recommendations made and accepted.⁴⁴⁴

2) Special Procedures

Sometimes the Council creates mandates for experts to conduct an in-depth analysis of a particular situation. These expert mandates (independent experts, special rapporteurs, working groups) are collectively known as special procedures.

The General Assembly Resolution 60/251 establishing the Council called upon the latter to continue to maintain the system of special procedures that had been put in place by the Commission, with the direction that the Council should review and, where necessary, improve and rationalize all the mandates within one year of holding its first session. The Council passed resolutions containing provisions on the selection of mandate-holders, review of all mandates and code of conduct for mandate-holders.

Special procedures may concern mandates on a specific subject (‘thematic mandates’) or on a specific country (‘country mandates’). Thematic mandates are

⁴⁴⁴https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/o/Human-rights-Council-practical-guide_en

generally renewed every three years, while country mandates must be re-evaluated after one year. On 1st December 2017, there are 44 thematic mandates and 12 country mandates. The special procedures are independent as the mandate-holders serve in a personal capacity without receiving a salary or any instruction from the states.

The President of the Council appoints the holders of these mandates as follows: (a) OHCHR launches an appeal for candidates; (b) Each candidate submits an application for a specific special procedures position; (c) the HRC Consultative Group (composed of five members from different regional groups) considers the applications, holds interviews and submits a shortlist of candidates to the Council President (three persons per position); and (d) The President follows the recommendations of the Consultative Group. If he fails to do so, he must state the reasons for his choice to the Council. Mandate-holders report annually to the Council, and a large number additionally report to the Third Committee of the General Assembly.

There are also special procedures where the mandate is carried out by a group of five experts (one for each region), known as the Working Group.

The special procedures can use the following instruments:

- (a) Annual reports and recommendations to the HRC on a yearly basis;
- (b) Communications: certain mandates allow for intervention on specific allegations of human rights violations. On receiving information of a violation, a mandate-holder may send a letter of allegation or an urgent appeal to the government concerned, asking the latter to clarify or comment on the allegation, or requesting that preventive or investigatory action be taken;
- (c) Country visits: holders of thematic mandates can visit countries in order to assess the institutional, legal, judicial and administrative frame-work, and investigate the de facto human rights situation under their respective mandates.
- (d) Thematic studies/procedures: mandate-holders can conduct studies clarifying the scope of a specific right, thus also contributing to the implementation of international law (e.g. report on solitary confinement of the Special Rapporteur on torture).
- (e) Independent inquiry committees and the international fact-finding missions established by the Council, whose mandate tends to be of a more limited duration with the object of investigating and establishing the facts with regard to particular events in a specific country before submitting conclusions to the Council.

3) Thematic special procedures

These thematic special procedures as discussed above are termed as the crown jewel of the UN Human Rights System.⁴⁴⁵ These procedures are devoted to a particular theme instead of a country or a region. The first example was the ‘Working Group on Disappearances’ established in 1980. It was established for Argentina but the UN, not to single out Argentina, did not use its name. With the passage of time, the thematic mechanisms have increased significantly. In 1985, there were only three whereas their numbers raised to more than 28 and in 2004, about 100 reports were submitted about 40 countries and 1300 communications were sent to 142 governments in respect of 4448 individual cases.

The special procedures, as says Amnesty International, are at the core of the UN Human Rights machinery. They are independent and objective experts who can monitor and respond to situations and allegations of violations of human rights. They play a unique role in promoting and protecting human rights but they work haphazardly, lack proper funding, lack cooperation of states etc.⁴⁴⁶ The following 44 Thematic Special Procedures have been established:

(a) Working Groups

- 1) Working Group on people of African descent
- 2) Working Group on Arbitrary Detention
- 3) Working Group on enforced or involuntary disappearances
- 4) Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination
- 5) Working Group on the issue of human rights and transnational corporations and other business enterprises
- 6) Working Group on the issue of discrimination against women in law and in practice

(b) Independent Experts

- 7) Independent Expert on the enjoyment of human rights of persons with albinism
- 8) Independent Expert on the promotion of a democratic and equitable international order

⁴⁴⁵ Henry J. Steiner “International Human Rights In Context-Law Politics Morals”, 3rd Ed. Kofi Annan, Secretary General of UN-2006, Oxford Publishers at page 765

⁴⁴⁶ Ibid

- 9) Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights
- 10) Independent Expert on human rights and international solidarity
- 11) Independent Expert on the enjoyment of all human rights by older persons
- 12) Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

(c) Special Rapporteurs

- 13) Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context
- 14) Special Rapporteur on the sale of children, child prostitution and child pornography
- 15) Special Rapporteur in the field of cultural rights
- 16) Special Rapporteur on the right to development
- 17) Special Rapporteur on the rights of persons with disabilities
- 18) Special Rapporteur on the right to education
- 19) Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment
- 20) Special Rapporteur on extrajudicial, summary or arbitrary executions
- 21) Special Rapporteur on extreme poverty and human rights
- 22) Special Rapporteur on the right to food
- 23) Special Rapporteur on the rights to freedom of peaceful assembly and of association
- 24) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
- 25) Special Rapporteur on freedom of religion or belief
- 26) Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes
- 27) Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
- 28) Special Rapporteur on the situation of human rights defenders
- 29) Special Rapporteur on the independence of judges and lawyers
- 30) Special Rapporteur on the rights of indigenous peoples

- 31) Special Rapporteur on the human rights of internally displaced persons
- 32) Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members
- 33) Special Rapporteur on the human rights of migrants
- 34) Special Rapporteur on minority issues
- 35) Special Rapporteur on the right to privacy
- 36) Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance
- 37) Special Rapporteur on contemporary forms of slavery, including its causes and its consequences
- 38) Special Rapporteur on the promotion and protection of human rights while countering terrorism
- 39) Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
- 40) Special Rapporteur on trafficking in persons, especially women and children
- 41) Special Rapporteur on the promotion of truth, justice, reparation & guarantees of non-recurrence
- 42) Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights
- 43) Special Rapporteur on violence against women, its causes and consequences
- 44) Special Rapporteur on the human right to safe drinking water and sanitation

Currently, there are the following 12 country-specific special procedures in action:

a. Independent Experts

- 1) Independent Expert on the situation of human rights in Central African Republic
- 2) Independent Expert on the situation of human rights in Mali
- 3) Independent Expert on the situation of human rights in Somalia
- 4) Independent Expert on the situation of human rights in the Sudan

b. Special Rapporteurs

- 5) Special Rapporteur on the situation of human rights in Belarus
- 6) Special Rapporteur on the situation of human rights in Cambodia
- 7) Special Rapporteur on the situation of human rights in Eritrea
- 8) Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea
- 9) Special Rapporteur on the situation of human rights in the Islamic Republic of Iran
- 10) Special Rapporteur on the situation of human rights in Myanmar
- 11) Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967
- 12) Special Rapporteur on the situation of human rights in the Syrian Arab Republic

4) Complaint procedure

The formerly 1503 Procedure is named due to ECOSOC Resolution 1503 (1970)⁴⁴⁷ which authorized the Human Rights Commission to establish a procedure for the examination of complaints (normally called communication) pertaining to 'situations which appear to reveal a consistent pattern of gross and reliably attested violation of human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.'

The procedure was time-consuming, difficult and lengthy so that states are not lightly accused of violations. Individual matters were not entertained but 'situations' were considered. Approximately, on average 500,000 complaints were received per year. From 1997 to 2005, about 86 states had been subject of scrutiny- 27 of Africa, 27 of Asia, 16 of Latin America, 10 of Eastern Europe and 6 of the Western Europe. The newly established Human Rights Council has amended this Procedure.

On 18th June 2007, the Human Rights Council adopted a new 'Complaint Procedure' in compliance with the mandate entrusted by General Assembly which mandated council 'to review and, where necessary, improve and rationalize, within one year after the holding of its first session, all mandates, mechanisms, functions and responsibilities of the former Commission on Human Rights, including the 1503 procedure, in order to maintain a system of special procedures, expert advice and a complaint procedure.'⁴⁴⁸

⁴⁴⁷ 2.Resolution 1503 (XLVIII)

⁴⁴⁸ Resolution 60/251 of 15 March 2006

The new Procedure retains its confidential nature, with a view to enhancing cooperation with the State concerned. Two separate working groups, (i) the Working Group on Communications, and (ii) the Working Group on Situations, are established with the mandate to examine the communications and to bring to the attention of the Council consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms. Manifestly ill-founded and anonymous communications are screened out by the Chairperson of the Working Group on Communications, based on the admissibility criteria detailed below. Communications not rejected in the initial screening are transmitted to the State concerned to obtain its views on the allegations of violations.

The Advisory Committee of the Human Rights Council, from among its members, constitutes the Working Group on Communications (WGC) for a term of three years. It consists of five independent and highly qualified experts geographically representative of the five regional groups. The WGC meets to assess the admissibility and the merits of a communication. All admissible communications and recommendations thereon are transmitted to the Working Groups on Situations.

The Working Group on Situations (WGS) comprises five members appointed by the regional groups from among the States member of the Council for the period of one year. It examines the communications transferred to it by the WGC, including the replies of States thereon, as well as the situations, which the Council is already seized of under the complaint procedure. The WGS, on the basis of the information and recommendations provided by the WGC, presents the Council with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and makes recommendations to the Council on the course of action to take. The Council then decides on each situation.

The Council or the WGC admits all communication related to a violation of human rights and fundamental freedoms unless:

- a) It has manifestly political motivations; or
- b) Its object is not consistent with the UN Charter, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law; or
- c) It does not contain a factual description of the alleged violations, including the rights which are alleged to have been violated; or
- d) Its language is abusive, but such communication may be considered after deletion of the abusive language;
- e) It is not submitted by a person or a group of persons claiming to be the victim of violations of human rights and fundamental freedoms or by any person or group of persons, including NGOs acting in good faith in accordance with

the principles of human rights and claiming to have direct and reliable knowledge of those violations; or

- f) It is exclusively based on reports disseminated by mass media;
- g) It refers to a case that is already being dealt with by a United Nations or similar regional complaints procedure; or
- h) The domestic remedies have not been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.⁴⁴⁹

5) Advisory Committee

The Advisory Committee is a subsidiary body of the HRC, which functions as a kind of think-tank. It replaces the former Sub-Commission on Human Rights. The Committee is composed of 18 experts who serve in their personal capacity and are elected by the HRC. The Advisory Committee seeks to provide expertise to the Council by conducting studies and research on certain thematic issues, at the request of the Council and within the scope of its mandate. Its function is purely advisory and it puts forward recommendations for consideration by the Council. The Committee convenes twice a year and its sessions are open to states, NGOs, national human rights institutions, special agencies and intergovernmental organisations.⁴⁵⁰

6. Fact-finding

Most of the UN procedures depend on fact finding. It means ascertaining a given situation and to report about it to the relevant body in the light of international human rights standards. The credibility of the fact-finding depends on many factors i.e., thoroughness, objectivity, procedural fairness in the ascertainment of facts. There are also great difficulties in the way of fact-findings i.e., denial of government about violations or exaggeration of situations by the interested groups.

The Special Rapporteurs and other Independent Experts of the Commission on Human Rights adopted in 1997, their own Terms of Reference and agreed that during fact finding missions, the Special Rapporteurs or Representatives, or Experts of the Commission on Human Rights, as well as United Nations staff accompanying them, should be given the following guarantees and facilities, among others, by the Government that invited them to visit its country:

⁴⁴⁹ .A/HRC/3/CRP.3,A/HRC/4/CRP.6 and A/HRC/5/CRP.6.

⁴⁵⁰ The section is borrowed from:

https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Un o/Human-rights-Council-practical-guide_en

- a. Freedom of movement in the whole country, including facilitation of transport, in particular to restricted areas;
- b. Freedom of inquiry, in particular as regards:
 - i. Access to all prisons, detention centres and places of interrogation;
 - ii. Contacts with central and local authorities of all branches of government;
 - iii. Contacts with representatives of non-governmental organizations, other private institutions and the media;
 - iv. Confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty; and
 - v. Full access to all documentary material relevant to the mandate;
- c. Assurance by the government that no persons, officials or private individuals who have been in contact with the Special Rapporteurs or Representative or Expert in relation to the mandate will for this reason suffer threats, harassment or punishment or subjected to judicial proceedings; and
- d. Appropriate security arrangements without, however, restricting the freedom of movement and inquiry referred to above.⁴⁵¹

⁴⁵¹ UN Doc. No. E/CN.4/1998/45, Appendix V

Chapter Seventeen

UNITED NATIONS AND NGOs PARTNERSHIP

1. Introduction

Non-Governmental Organizations (NGOs) are a very important part of the broader human rights movement. They not only bring out the facts, but also contribute to standard setting as well as to the promotion and enforcement of human rights norms with speed and decisiveness. They normally call governments to account for and compel reconsideration of policies that disregard human rights. International NGOs have become a bridge between the real world of violations, 'what happens out there,' and legal-political and bureaucratic institutions in the human rights world.

Although there was no formal provision for them, NGOs in practice had access to the League of Nations and this experience influenced future developments. The US delegation to the San Francisco Conference of 1946 which drafted the UN Charter included NGO representatives.

Article 71 of the UN Charters acknowledges the important role of NGOs. The Article reads: 'The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations, which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate with national organizations after consultations with the Members of the United Nations.'

The UN human right mechanisms rely heavily on NGOs for alternative information as well, as to heighten the external pressure on the delinquent states. On the other hand, the NGOs have only reluctantly been awarded lobbying 'rights.' The existing consultative arrangements within the UN system are overloaded and unsustainable.

The International Non-Governmental Organizations' (INGOs) activities focus on the preparation of reports on country situations throughout the world. They distribute these reports, provide the information to media and advocate before national executives or legislatures and International Organizations. Sometimes, they initiate or join as *amicus curiae* (friend of the court) in litigation. Their other activities include drafting proposed legislation, human rights education, protests and demonstrations, letter-writing, monitoring and critiquing the works of governmental and inter-governmental human rights agencies, and working with and strengthening their local affiliates.

The First world INGOs like Amnesty International normally concentrate on individuals' cases involving violations of identifiable persons' rights to personal security. This stress on individual cases may blur the big picture, the systemic and structural issues that underline violation: land-holding pattern, ethnic and class discrimination, unrepresentative political formations, mal-distribution of resources and power. The critics argue that economic and social rights must figure as parts of an integrated view of needs and rights in Third World Societies.

It is true to a great extent but the principal INGOs are more than the statisticians of violence. They refer to such factors as military control over civilian government, unequal power among ethnic groups, and concentration of economic resources in small elite. Secondly, who will report facts if most NGOs did not? Thirdly, the immediate necessity for human rights groups is to stop violations. Fourthly, think tanks, academics, government policy makers do concentrate on broader social analysis.⁴⁵²

2. Consultative Principles

The UNESCO Resolution 1296 enunciates the following principles to be applied in establishing consultative relations with NGOs. The following principles shall be applied in establishing consultative relations with non-governmental organizations:⁴⁵³

- (1) The organization shall be concerned with matters falling within the competence of the Economic and Social Council with respect to human rights.
- (2) The aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations.
- (3) The organization shall undertake to support the work of the United Nations and to promote knowledge of its principles and activities.
- (4) The organization shall be of representative character and of recognized international standing; it shall represent a substantial proportion, and express the views of major sections, of the population or of the organized persons within the particular field of its competence, covering, where possible, a substantial number of countries in different regions of the world.

⁴⁵²Henry Steiner, *Diverse Partners: Non-Governmental Organizations in The Human Rights Movement*, 1991 at 19

⁴⁵³ 2.UN UNESCO Resolution 1296 (XLIV) (1968)

- (5) Where there exist a number of organizations with similar objectives, interests and basic views in a given field, they shall, for the purpose of consultation with the Council, form a joint committee or other body authorized to carry on such consultation for the group as a whole. It is understood that when a minority opinion develops on a particular point within such a committee, it shall be presented along with the opinion of the majority.
- (6) The organization shall have an established headquarters, and a democratically adopted constitution.
- (7) Subject to paragraph 9, 11 and 12 below, the organization shall be international in its structure.
- (8) Any international organization, which is not established by inter-governmental agreement, shall be considered as a non-governmental organization for the purpose of these arrangements, including organizations, which accept members designated by governmental authorities if such membership does not interfere with the free expression of views of the organization.
- (9) The basic resources of the international organization shall be derived in the main part from contributions of the national affiliates or other components or from individual members.
- (10) Where voluntary contributions have been received, their amounts and donors shall be faithfully revealed to the Council Committee on Non-Governmental Organizations. Any financial contribution or other support, direct or indirect, from a Government to the international organization shall be openly declared.
- (11) National Organizations shall normally present their views through international non-governmental organizations to which they belong.
- (12) National Organizations, however, may be admitted after consultation with the Member State concerned in order to help achieve a balanced and effective representation of non-governmental organizations reflecting major interests of all regions and areas of the world, or where they have special experience upon which the Council may wish to draw.
- (13) The consultative status shall be suspended up to three years or withdrawn in the following cases:

- (a) If there exists substantiated evidence of secret governmental financial influence to induce an organization to undertake acts contrary to the purposes and principles of the Charter of the United Nations;
- (b) If the organization clearly abuses its consultative status by systematically motivated acts against Members States of the United Nations contrary to and incompatible with the principles of the Charter;
- (c) If, within the preceding three years, an organization had not made any positive or effective contribution to the work of the Council or its commissions or other subsidiary organs.

The current consultative arrangements pose two questions: (1) does this consultative status provide NGOs effective access to the UN system; and (2) how can the NGOs who do not have consultative status obtain effective access: those who do not have consultative status may submit information to various thematic rapporteurs and treaty monitoring bodies.

The national governments are hostile towards the idea of more open participation by NGOs within the UN system. The final text of the Second World Conference on Human Rights in Vienna (1993) represents a setback for human rights advocates. It states that 'Non-governmental organizations genuinely involved in the field of human rights should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights and the protection of the national law. Non-governmental organizations should be free to carry out their human rights activities, without interference, with the framework of national law and the Universal Declaration of Human Rights.'

The reference to national law undermines a fundamental premise of international human rights law; international standards are necessary precisely because national law so often offers inadequate protection.⁴⁵⁴

3. Categories of NGOs

The ECOSOC has requested the General assembly to examine the question of participation of NGOs in all areas of the UN. The Secretary General has submitted this report on 10th July 1998.

⁴⁵⁴ Michael Posner and candy whittome, the Status of Human rights NGOs, 25 Colum. Hum. Rts. L. Rev. 269 (1994), at 283

Keeping in view the UN's philosophy to further and strengthen the civil society (i.e., the sphere in which social movements organize themselves around objective, constituencies and the thematic interest), this Report provides a comprehensive overview of the present institutional arrangements, which frame the relations between the UN and NGOs.

For nearly three decades, arrangements for consultation of the Economic and Social Council with NGOs were governed by Resolution 1296 (XLIV) of 23rd May 1968. In 1996, after a thorough review, the Council adopted Resolution 1996/31, which established three categories of status for NGOs:

- (a) General consultative status is for large international NGOs whose work covers most of the issues on the Council's agenda;
- (b) Special consultative status is for NGOs that have special competence in a few fields of the Council's activity; and
- (c) Inclusion on the Roster is for NGOs whose competence enables them to make occasional and useful contributions to the work of the United Nations and who are available for consultation upon request.

4. NGOs Committee

The Committee on Non-Governmental Organizations is a standing committee of the ECOSOC. It was established by Economic and Social Council Resolution 3 of 1946. Its membership consists of: (a) five members from African States; (b) four members from Asian States; (c) two members from Eastern European States; (d) four members from Latin American and Caribbean States; (e) four members from Western European and other states.⁴⁵⁵

The main tasks of the committee are (a) the consideration of application for consultative status and requests for reclassification submitted by NGOs; (b) the consideration of quadrennial reports submitted by NGOs in General and Special categories; (c) the implementation of the provisions of Councils resolution 1996/31 and the monitoring of the consultative relationship; and (d) any other issues which the ECOSOC may request the Committee to consider.⁴⁵⁶

In accordance with resolution 1996/31, the Committee considers applications for consultative status submitted by non-governmental organizations and requests for changes in status and makes recommendations to the ECOSOC. At each session, which is held annually, the Committee considers applications received not later than 01 June of the preceding year.

⁴⁵⁵ UN ECOSOC Resolution No. 3 (II) of 21 June 1946

⁴⁵⁶ UN ECOSOC Resolution No. 1996/3

Organizations in consultative status in General and Special categories submit to the Committee on Non-Governmental Organizations, through the Secretary General, every fourth year a brief report of their activities in support of the work of the United Nations. Based upon its findings, the Committee may recommend to the ECOSOC a reclassification in status of the NGO concerned.

5. NGOs Rights

Those NGOs, which are granted consultative status, acquire certain rights and responsibilities. The provisional agenda of the Human Rights Council is communicated to all of them and NGOs with general status have the right to place items on this agenda and that of the Council's subsidiary bodies. Organizations with general and special status may designate authorized representatives to sit as observers at public meetings of the Economic and Social Council and subsidiary bodies. NGOs on the roster may have representatives at such meetings concerned with matters within their field of competence.

Organizations in general and special status may submit brief written statements which can be published as United Nations documents and circulated to members of the Council or subsidiary bodies. Organizations on the Roster may also be invited to submit written statements. Economic and Social Council resolution 1996/31 makes provision for oral presentations by organizations in general or special consultative status during certain meetings of the Council.

Secretary General is authorized to offer facilities to NGOs in consultative status, including:

- (a) Prompt and efficient distribution of documents of the Economic and Social Council and its subsidiary bodies as appropriate;
- (b) Access to United Nations press documentation services;
- (c) Arrangement of informal discussions on matters of special interest to groups or organizations; and
- (d) Appropriate seating arrangements and facilities for obtaining documents during public meetings of the General Assembly that deal with matters in the economic, social and related fields.⁴⁵⁷

Similarly, Member States may also wish to consider the establishment of a trust fund for the purpose of facilitating the participation of NGOs from developing and least developed countries, and countries in transition, in activities of the Organization. This fund could serve to provide such NGOs with the means of

⁴⁵⁷ Report available on the official web site of UN in the section dealing with NGOs

retrieving important information from United Nations sources as well as attending important meetings or conferences of relevance to their work.⁴⁵⁸

6. Balance Sheet

(a) Contributions

- 1) Currently, 4,045 NGOs enjoy consultative status with ECOSOC. ECOSOC accreditation is separate and distinct from NGOs who are associated the UN Department of Public Information (DPI). These organizations generally have far fewer privileges to participate in intergovernmental meetings of the United Nations.⁴⁵⁹ Consultative status provides NGOs with access to not only ECOSOC, but also to its many subsidiary bodies, to the various human rights mechanisms of the United Nations, ad-hoc processes on small arms, as well as special events organized by the President of the General Assembly.
- 2) The Human Rights NGO community is asserting itself in all relevant UN bodies. A huge number of such organizations are working alongside. NGOs of the international women's movement have mobilized the interest of hundreds of thousands of women in a wide range of international political, economic and social issues. They have perceived the centrality of the UN system in these issues. Their leaders are equally determined to take a hand in the future of the UN.⁴⁶⁰
- 3) The majority of funds, agencies and programmes of the United Nations system have also received a clear mandate from their governing bodies to work with NGOs, and have developed a wide range of mechanisms in this field.
- 4) NGOs have capacity to gather public support for and raise general awareness on a number of important subjects. Joint advocacy campaigns with NGOs at the international and national levels, have often met with considerable success. The Ottawa process, which led to the adoption, in December 1997, of the Convention banning anti-personnel landmines is a striking example of effective partnership between intergovernmental, governmental and non-governmental actors. The process and the role played in it by the International Campaign to Ban Landmines, an umbrella group of NGOs active in this field, have shown that determined, knowledgeable and well-organized NGOs that are willing to form caucuses and alliances can achieve success in advocacy

⁴⁵⁸ UN Doc. A/49/215 (1994), at 12

⁴⁵⁹ <https://www.un.org/development/desa/dspd/civil-society/ecosoc-status.html>

⁴⁶⁰ Erskine Childers, *We the People*, in 'Renewing the United Nations system' 171 (1994) at 172

and lend tremendous weight to International and United Nations-led campaigns.

- 5) United Nations Children Emergency Fund (UNICEF) has strong reliance on NGOs in its advocacy campaigns, such as those on the implementation of the recommendations of the United Nations report on the impact of armed conflicts on children, the 'Child-friendly city initiative' or the subject of the sexual exploitation of children. NGOs' involvement in the latter was particularly important. The Conference on Sexual Exploitation of Children, held in Stockholm in 1996, was co-sponsored and organized on an equal footing by the Government of Sweden, UNICEF and the NGO called End Child Prostitution and Trafficking.
- 6) The policy of United Nations High Commissioner for Refugees (UNHCR) is to work with national NGOs whenever possible. While the primary objective of its strategy in support of national organizations is to ensure appropriate local capacity to meet the humanitarian assistance needs of refugee operations in the most effective manner, a secondary aim is to build the capacity of national organizations to work beyond the needs of a UNHCR operation and to contribute, in the longer term, to rehabilitation and development. UNHCR supports national NGOs through the identification and assessment of their capacities followed by training and capacity-building programmes. UNHCR also encourages international NGOs to work directly with national NGOs, with a view to handing over activities when feasible.
- 7) In order to promote local NGO participation and ensure long-term benefits of food aid assistance, World Food Programme requests international NGOs to involve local partner in their activities. In some cases, this request has been included in the contract determining the modalities of collaboration with the international NGO.
- 8) The easiest area in which to document the contribution of NGOs is in standard-setting for human rights. Perhaps the most extensively documented are the roles of the International Commission of Jurists and Amnesty International in relation to the Declaration and Convention against Torture.
- 9) Role of the NGO group in the drafting of the (1989) Convention on the Rights of the Child, is 'without parallel in the history of drafting international instrument.' The role of NGOs in the reporting procedure under the Convention on the Rights of the Child is more specific and well-developed, partly because of the major contribution of NGOs to the drafting of the Convention.

- 10) The treaty bodies, the committees set up by the human rights covenants and conventions to oversee their implementations, rely extensively, on NGOs information when examining these reports from States Parties. Although NGOs were not initially provided with an official role in the international human rights treaty-monitoring process in general, but in 1993, the Vienna Statement of the International Human Rights Treaty Bodies recognized that 'the active cooperation of non-governmental organizations is essential to enable the treaty bodies to function in an informed and effective manner. They have important roles to play in: scrutinizing State Party's reports at the national level: providing information to treaty-bodies; assisting in the dissemination of information; and contributing to the implementation of recommendations by the treaty bodies.'
- 11) Although NGOs themselves cannot use the individual petition procedures under the international human rights treaties, they play a major facilitating role in making known the procedures.
- 12) Fact-finding is one of the distinctive contributions of human rights NGOs because of their access to information directly, through networks and through field visits.
- 13) By publicizing situations, human rights NGOs can literally 'put them on the map.' A high-profile initiative by A1 at the World Conference on Human Rights bore fruit at the 1993 General Assembly, when the post of High Commissioner for Human Rights was created. Similarly, many of the mechanisms of the Commission, including the UN's first 'thematic mechanism,' the Working Group on Enforced or Involuntary Disappearances (1980), resulted from NGO initiatives or consistent provision of well-documented information about widespread violations, and rely on NGO sources, as well as responding to NGO pressure for action and results.

(e) Limitations

- 1) There also exist a number of constraints or potential difficulties that limit the scope of United Nations collaboration with NGOs. They lie principally in the sheer number of organizations and their diversity, their occasional organizational weaknesses, the fragility of certain grass-roots organizations and sometimes divergent positions among NGOs and between NGOs and national governments. Furthermore, over dependence on external financing can sometimes undermine the sustainability and even independence of NGOs. Nonetheless, the balance remains overwhelmingly favourable to a strengthened cooperation between the United Nations system and NGOs in operational matters, at Headquarters and in the field

- 2) Governments impose limits on NGOs. NGOs are excluded from direct access to almost all international treaty complaints procedures.
- 3) The division of the UN, between Geneva (human rights) and New York (peace, security and peace-keeping) makes it difficult both physically and conceptually for NGOs to integrate these issues.
- 4) It is also NGOs' greatest challenge to governments who wish to hide or ignore what is happening. The reliability of an NGO's information is crucial and is likely to be subject to constant challenge by accused governments. Mistakes will be thrown back at them and will rapidly erode their credibility, 'their most important asset' while a reputation as purveyors of accurate information will gain 'privileged access of government'.⁴⁶¹
- 5) There is lack of finances and personnel, and these are frequently exacerbated by personality cults and reluctance to co-operate with other NGOs. The smallness of many NGOs renders them prone to considerable fluctuation in their fortunes depending on the quality of the individual staff members at any given time.
- 6) This resource constraint encourages the 'bandwagon' approach, joining in on a popular, or media led, issue or simply responding to crises and with it a reluctance to pursue the longer term or lower profile areas of work.
- 7) International NGOs suffer another limitation that 'it is local human rights organizing and education that is the decisive component in the protection and promotion of human rights in the national context.'
- 8) The more repressive the regime, the harder it is to establish local NGOs because 'to promote human rights you need human rights. You have to be able to form a group, to meet and to seek and impart information, all of this within and across national frontier. Unless there is some degree of the freedoms of association, expression and assembly, the ability to protect human rights is severely hampered and access to information about what is happening is also restricted.
- 9) All the limits on NGOs are not external. Many are self-imposed either deliberately or because of lack of vision e.g. humanitarian, refugee and development NGOs for example, do not see themselves as human rights organizations and do not use human rights terminology, concepts or procedures.
- 10) The relationship of the NGOs with governments is problematic. The NGOs cannot achieve much without governmental co-operation and it requires a negotiating and balancing process between quiet diplomacy and public denunciation. If the NGOs become too close with the governments, they may

⁴⁶¹ <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-9248.1995.tb01738.x>

in fact become part of the establishment, with a vested interest in it, preserving their status and accepting its agenda and procedures rather than being prepared to challenge the entire direction, nature and content of policies of the governments.

- 11) There is a fundamental issue here: whether 'issues of human rights violations can be adequately addressed without advocating for changes in the overall structure that begets such violation.' Traditionally, human rights NGOs have followed the principle of international human rights law that the governmental system per se is not a legitimate concern of the international community; however, there is the beginning of a general consensus that a state lacking a democratic form of government and a commitment to the rule of law cannot guarantee the enjoyment of human rights.⁴⁶²

⁴⁶² RACHEBLRETT, 'The Role and Limits of Human Rights NGOs at the United Nations', <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-9248.1995.tb01738.x>

Part IV
REGIONAL HUMAN RIGHTS

Chapter Eighteen

EUROPEAN REGIME OF HUMAN RIGHTS

1. Introduction

The factors, which led the United Nations to concern itself with the protection of human rights, had a similar effect in Europe. One such factor was natural reaction against the Nazism and Fascism, which had provoked the Second World War and wrought such havoc on millions of lives. Another stimulus was that in the post-war years it soon became evident that the democratic systems of Western Europe needed protection against the Soviet style of despotism which had captured control of half of the Continent.

The principles championed by the Magna Carta, English Bill of Rights and French Revolution were menaced by a new political philosophy in which the so-called dictatorship of the proletariat gave all power to the State and reduced the individual to insignificance. The preservation of democracy and the maintenance of the rule of law required, as the then French Foreign Minister Robert Schuman put it, foundations ‘on which to base the defence of human personality against all tyrannies and against all forms of totalitarianism.’⁴⁶³ Those foundations were the effective protection of human rights and fundamental freedoms.

As early as August 1941, the Atlantic Charter proclaimed the historic Four Freedoms and the right of self-determination. Similarly, the Congress of Europe at The Hague in May 1948, announced:

‘We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition; we desire a Court of Justice with adequate sanctions for the implementation of this Charter.’

⁴⁶³ Arthur Henry Robertson, ‘Human Rights in Europe. Manchester University Press, U, 1963; Page 5

An organized system was needed to ensure the collective guarantee of human rights in the proposed 'European Union'. The Consultative Assembly of the Council of Europe took up the task of designing such a system during its first session, in August-September 1949. In August 1949, the Assembly's Committee on Legal and Administrative Questions met to study a proposal for the establishment of 'an organization within the Council of Europe to ensure the collective guarantee of human rights' and before the end of the session presented its conclusions in the famous Teitgen Report of September 1949, which paved way for the Convention.

The Convention was signed in 1950, and came into force on 3rd September 1953. In the summer of 1950, even before the Convention was signed, the Assembly had proposed the inclusion of three additional rights, which were subsequently included in Protocol No.1, signed in March 1952, and which entered into force two years later. Four further protocols have been concluded between the years 1963 and 1994.

The ECHR is of particular importance in the context of initial human rights movement for several reasons:

- (i) It was the first comprehensive treaty in the World;
- (ii) It established the first international complaint procedure and the international court for the determination of human rights matters;
- (iii) It remains the most developed of three regional systems (other being American and African); and
- (iv) It has generated a more extensive jurisprudence than any other part of the international system.

It is clear that the Convention has been astoundingly successful in creating a standard of human rights, which is perceived by so many Europeans as relevant and valuable despite the 40 odd years, which have passed since it was created. Although it was only intended to create a minimum standard of human rights, yet it has succeeded in changing national laws as well. On the other hand, it may be argued that the machinery for the enforcement of the Convention is wholly inadequate. In the process if an

application is ultimately successful it takes five years before the final decisions; the individual affected must suffer a violation of his or her rights for all that time. There is no formal mechanism available, such as an interim injunction, to prevent the continuing violation.

2. Rights guaranteed

The first Article of the Convention provides: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention.’ The obligation assumed by each State is, therefore, not limited to protecting the rights of its own nationals, nor even to protecting those of the nationals of the other contracting parties. The obligation extends to all persons within the jurisdiction, whatever their nationality or legal status, and however short their length of stay.

The rights defined include, as we shall see shortly, the civil and political rights, which are the hallmarks of a democratic society. Yet they do not include every right one might wish to see guaranteed in an ideal community. As a result, many individual applications to the Commission and Court have to be rejected because the applicant alleges the violation of a right, which, however necessary or desirable, is not covered by the Convention or its protocols.

Part I of the Convention sets out twelve rights and freedoms, which are specifically guaranteed. We enumerate them as an overview:

- 1) Right to life (Article 2);
- 2) Freedom from torture (Article 3);
- 3) Freedom from slavery (Article 4);
- 4) Right to liberty and security (Article 5)
- 5) Right to a fair trial (Article 6);
- 6) Protection against retroactivity (Article 7);
- 7) Right to respect for privacy (Article 8);

- 8) Freedom of thought and religion (Article 9);
- 9) Freedom of expression (Article 10);
- 10) Freedom of assembly and association (Article 11);
- 11) Right to marry and family (Article 12);
- 12) Right to an effective remedy (Article 13); and
- 13) Prohibition of discrimination (Article 14).

Protocol No. 1 adds three further rights:

- 14) Right to property (Article 1);
- 15) Right of parents to ensure education of their children in conformity with their own religious and philosophical convictions (Article 2); and
- 16) Right to free elections (Article 3).

Protocol No. 4 adds four more rights:

- 17) Freedom from imprisonment for debt (Article 1);
- 18) Liberty of movement and freedom to choose one's residence (Article 2);
- 19) Freedom from exile and the right to enter country of which one is a national (Article 3); and
- 20) Prohibition of collective expulsion of aliens (Article 4).

Protocol No. 6 adds one further right:

- 21) Prohibition of death penalty in time of peace (Article 1 and 2).

Protocol No. 7 adds five further rights:

- 22) The right of an alien not to be expelled from a State without due process of law (Article 1);
- 23) The right to appeal in criminal cases (Article 2);
- 24) The right to compensation for a miscarriage of justice (Article 3);

- 25) Immunity from being prosecuted twice for the same offence (Article 4); and
- 26) Equality of rights and responsibilities of spouses as regards matters of a private law character between them and in their relations with their children (Article 5).

Protocol 12

- 27) No discrimination

Protocol 13

- 28) Complete abolition of death penalty.

In many Articles, the first sentence or paragraph contains a general affirmation of the right, often based on the text of the Universal Declaration of Human Rights and the following paragraphs set out the limitations to which that right might be subjected. However, the limitations are carefully formulated and, in general, permitted only when they are prescribed by law and are necessary in a democratic society to safeguard some aspect of the public interest.

Articles 14-18 of the Convention relate to the exercise of the rights guaranteed. Article 14 contains a widely drawn prohibition against discrimination. Article 15 permits the suspension of some, though not all, rights ‘in time of war or other emergency threatening the life of the nation,’ but only ‘to the extent strictly required by the exigencies of the situation’ and after a notice of derogation has been filed with the Secretary General of the Council of Europe.

Article 16 permits restrictions on the political activities of aliens. Article 17 provides that ‘nothing in this Convention shall be interpreted as implying any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein.’ In addition, Article 18 stipulates that the restrictions, which are permitted under the

Convention, may not be applied for any purpose other than those for which they have been prescribed.

1) Protection of life

Law protects everyone's right to life. No one can be deprived of his life intentionally except in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Deprivation of life will not be regarded as inflicted in contravention of this right when it results from the use of force which is not more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; and (c) in action lawfully taken for the purpose of quelling a riot or insurrection.⁴⁶⁴

The Article provides non-derogable protection of the right to life. This might seem straightforward – governments are enjoined to refrain from the wanton killing of their subjects – but in fact aside from that instance, it is in fact hard to determine what a right to life encompasses.

Decisions under Article 2 do not yet provide a clear answer to this question but do suggest that it places two distinct duties on the national authorities, although their scope is unclear. Firstly, it implies that the public authorities should refrain from some acts or omission, which directly endanger life. Secondly, Article 2 implies a positive obligation on the part of the state authorities to take reasonable steps in order to prevent the deprivation of life by individuals.

The question has arisen in the context of national legislation on abortion whether an unborn baby can fall within the interpretation of 'everyone'. In *Paton v UK* (1980), the Human Rights Commission found that Article 2 applies only to persons who have been born.

⁴⁶⁴ Article 2 of ECHR

The most important exception to Article 2 is that in respect of the death penalty which also includes extradition to a country where the death penalty is in force.

Generally speaking the paragraph 2 exceptions are reasonably straightforward and are obviously aimed mainly at unintentional deprivation of life. It has been held that paragraph 2 is concerned with situations where the use of violence is allowed as necessary force and may as an unintended consequence result in loss of life. However, paragraphs 2(a) and (c) would also seem to cover instances where the force used was bound to endanger life and was intended to do so but was necessary in the circumstances. Thus national laws recognizing the right to use self-defence are in principle in harmony with Article 2.

2) Inhuman treatment

No one can be subjected to torture or to inhuman or degrading treatment or punishment. Article 3 contains no exceptions unlike most of the Articles and it is also non-derogable. The three forms of treatment mentioned seem to represent three different levels of seriousness. Thus, torture, unlike degrading treatment, has been quite narrowly defined to include ‘deliberate inhuman treatment causing very serious and cruel suffering.’ Clearly, treatment, which could not come within this restricted definition, could still fall within one of the other two heads especially the broad head – ‘degrading treatment’. Degrading treatment will not, however, inevitably include all forms of physical punishment although it will include certain forms of corporal punishment including caning which has been found not to amount to torture or inhuman treatment.⁴⁶⁵

Number of cases have arisen concerning the position of detainees. In determining whether a particular treatment, such as solitary confinement, amounts to a violation of Article 3, a number of factors must be taken into account. These will include the stringency and duration of the measure, the objective pursued - such as the need for special security measures for the

⁴⁶⁵ For details refer to Convention Against Torture and other Inhuman or Degrading Treatment or Punishment, adopted on 13 Dec. 1984 and entered into force on 26 June 1987

prisoner in question or the fear of stirring up discontent among other prisoners and the effect on the person concerned.

However, for a breach of Article 3 to be established in the context of deportation cases, there must be clear risk of ill treatment. However, the Convention cannot be viewed as a substitute for an effective domestic means of determining refugee claims.

3) Slavery and servitude

No one can be held in slavery or servitude. No one shall be required to perform forced or compulsory labour. For the purpose of this right, the term ‘forced or compulsory labour’ shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service; (c) any service exacted in case of any emergency or calamity threatening the life or well-being of the community; or (d) any work or service which forms part of normal civil obligations.

Article 4 provides a guarantee, which is largely irrelevant in modern European democracies although it is conceivable that as states with less developed human rights regimes become signatories to the Convention, it might prove to be of value.

It is necessary to distinguish between slavery and servitude under paragraph 4(1) and forced or compulsory labour under paragraph 4(2). Slavery denotes total ownership, whereas servitude denotes less far-reaching restraints; it is concerned with the labour conditions and the inescapable nature of the service.

Forced or compulsory labour has been held to denote the following: ‘firstly that the work or service is performed by the worker against his will and, secondly, that the requirement that the work or service be performed is unjust or oppressive, or the work or service itself involves avoidable hardship.’

4) **Liberty and security**

Everyone has the right to liberty and security of person. No one can be deprived of his liberty except in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; or (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him. Everyone arrested or detained shall be brought promptly before a judge or other office authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Everyone who has been the victim of arrest or detention in contravention of the provisions of these rights will have an enforceable right to compensation.⁴⁶⁶

⁴⁶⁶ Article 5

The presumption embodied in the Article is that liberty and security must be maintained. However, it then sets out the two tests which must be satisfied if it is to be removed. Firstly, exceptions are set out where liberty can be taken away; secondly, procedure is set out which must be followed when a person is deprived of liberty. Thus, if the correct procedure is followed but an exception does not apply, Article 5 will be breached, as, conversely, it will if an individual falls within an exception but in detaining him or her the correct procedure is not followed.

5) Fair and public hearing

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interest of justice so requires; (e) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witness against him; (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6 is one of the most significant Articles and the one, which is most frequently found to have been violated. This is partly due to the width of paragraph 6(1), which may cover numerous circumstances in which rights are affected in the absence of a judicial hearing. Paragraph 1 imports a general requirement of a fair hearing applying to criminal and civil hearings. Paragraph 3 lists minimum guarantees of a fair hearing in the criminal context only. In practice then, paragraphs 1 and 3 may often both be in question in respect of a criminal charge.

‘Charge’ has been described as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.’ Offences under criminal law must be distinguished from those arising only under disciplinary law. In order to do so, the Court will consider the nature and severity of the penalty the person is threatened with. Moreover, classification of a petty offence as ‘regulatory’ rather than criminal will not be decisive for 6(1) purposes; the Commission / Court may yet determine that the offence is of a criminal character. Otherwise, by reclassifying offences, the State in question could minimize the application of the Convention.

Access to legal advice may not always imply a right to legal aid. However, in some instances a person unable to obtain legal aid would be unable to obtain legal advice and, therefore, might be unable to defend proceedings.

What other rights are implied by the term a ‘fair hearing’? It has been found to denote equality between the parties, and in principle entails the right of the parties to be present in person although criminal trial in absentia does not automatically violate Article 6. A refusal to summon a witness may constitute unfairness, as may a failure to disclose evidence.

The hearing must take place within a reasonable time. In determining what is meant by ‘reasonable’, fairly wide time limits have been applied so that in some circumstances as much as seven or eight years may be reasonable. It will take into account the conduct of the accused (which may have contributed to the delay) and the need for proper preparation of the case,

bearing in mind any special circumstances such as those which might arise in child care cases.

Paragraph 2 ‘requires, inter alia, that when carrying out their duties, members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.’

It is not enough that a lawyer should be assigned; he or she should be appointed in good time in order to give time to prepare the defence and familiarize himself or herself with the case. However, paragraph 6(3)(c) does not merely import a right to have legal assistance; it includes three rights:

- a) to have recourse, if desired, to legal assistance;
- b) to choose the assistance;
- c) if the defendant has insufficient means to pay, for that assistance to be given it free if the interest of justice so requires.

The Courts have wide discretion as to the right to cross-examine witnesses and so has deprived this right of some of its effect. The second limb, the right to call witnesses and have them examined under the same conditions as witnesses for the other side, obviously allows for a wide discretion as it only requires that the prosecution and defence should be treated equally as regards summoning witnesses.

6) Retrospectivity of laws

No one can be held guilty of any criminal offence because of any act or omission, which did not constitute a criminal offence under national or international law at the time when it was committed. Nor can a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This right cannot prejudice the trial and punishment of any person for any act or omission, which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.⁴⁶⁷

Article 7 contains an important principle and its, therefore, non-derogable although it is subject to the single exception. It divides into two separate principles:

1. The law in question must have existed at the time of the act in question for the conviction to be based on it.
2. No heavier penalty for the infringement of the law may be imposed than that was in force at the time the act was committed.

As far as the first principle is concerned this means that someone should not be convicted if he or she could not have known beforehand that the act in question was criminal.

Paragraph 7(2) provides an exception, which appears to arise if a person is convicted retrospectively for an offence recognized in other countries but not the one in question at the material time. This exception is potentially quite wide and; therefore, if it is not to undermine the principle of non-retroactivity, it may be argued that it should be interpreted restrictively.

7) Respect for privacy

Everyone has the right to respect for his privacy and family, his home and his correspondence. There can be no interference by a public authority with the exercise of this right except such is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.⁴⁶⁸

⁴⁶⁷ Article 7

⁴⁶⁸ Article 8

The inclusion of the wide (and undefined) term ‘private’ means that rights other than those rising from the home, family and correspondence may also fall within Article 8.

An important aspect of private life is that of control over personal information but there should be a procedure to weigh it up against a competing interest. It was held that although telephone tapping constituted an interference with a person’s private life, it could be justified as being in the interests of national security, and there were sufficient controls in place (permission had to be given by a Minister applying certain criteria including that of ‘reasonable suspicion’) to ensure that the power was not abused.

The Courts are greatly influenced by general practice in the member states as a body and will interpret the Convention to reflect such practice so that a State, which is clearly out of conformity with the others, may expect an adverse ruling. The application of this principle, which has been termed the ‘common standards’ principle, clearly allows flexibility in decision-making since it may sometimes be difficult to pinpoint the time at which a common standard could be said to have emerged.

The other aspect of privacy, which has generated a certain amount of case law, has related to sexual privacy and here the Court has adopted a cautious approach. In *Dudgeon* (1982) the Northern Ireland prohibition of homosexual intercourse was found to breach Article 8: In 1984, the Commission declared inadmissible an application challenging the Army Act 1955, which governs conviction for homosexual practices in the armed forces, on the basis that it could be justified under the prevention of disorder or protection of morals clauses.

‘Family’ may encompass formal or informal but if the ‘family’ in question might not fall within the term, as, for example, a foster parent might not do, there might still be an interference with private life. Generally, a close relationship falling within the term will be presumed where close ties such as those between parent and child exist; for other relations the presumption will be the other way.

Although the term 'family' may receive a broad interpretation but it was determined, that 'family life' cannot be interpreted so broadly as to encompass a father's right to be consulted in respect of an abortion. Had it not adopted such an interpretation 'family life' might have come into conflict with 'private life' since pregnancy and its management has been accepted as an aspect of a mother's private life, although not to be divorced entirely from consideration of the life of the fetus. Family life has also received a narrow interpretation in immigration cases in respect of a right to enter a country.

With regard to correspondence, the Court has accepted the right of a detainee to correspond with the outside world and in the UK has led to a steady relaxation of the rules relating to preventing, stopping and censoring of prisoners' correspondence.

8) Freedom of thought

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs can be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.⁴⁶⁹

The right under Article 9 of possessing certain beliefs is unrestricted. However, it provides a valuable guarantee against using compulsion to change an opinion or prohibiting someone from entering a profession due to their convictions. Freedom of religion will include the freedom not to take part in religious services, but it may also include the opposite obligation.

9) Freedom of expression

Everyone has the right to freedom of expression. This right includes freedom to hold opinion and to receive and impart information and ideas

⁴⁶⁹ Article 9

without interference by public authority and regardless of frontiers. This right cannot prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁴⁷⁰

Article 10 obviously overlaps with Article 9, but it is broader since it protects the means of ensuring freedom of expression.

The stance taken under Article 10 is that all speech is not equally valuable. The European Court values political speeches more than commercial ones. The Court has also stressed that Article 10 applies not only to speech, which is favourably received, but also to speech, which shocks and offends.

There is some evidence that the Court is reluctant to intervene in instances, which may not be perceived as constituting a direct interference with freedom of expression by domestic authorities.

Article 10 includes an additional guarantee of the freedom to receive and impart information. However, the words ‘without restriction by public authority’ do not imply a positive obligation on the part of the authority to ensure that information can be received.

10) Association and assembly

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

⁴⁷⁰ Article 10

No restrictions can be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This right cannot prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, the police or the administration of the State.⁴⁷¹

The addition of the word ‘peaceful’ has restricted the scope of assembly. Thus assemblies can be subject to permits so long as the permits relate to the peacefulness of the assembly and not to the right of assembly itself.

The public authorities may positively intervene in order to prevent an interference with freedom of assembly by private individuals.

‘Association’ need not be assigned its notional meaning. Even if a group such as a trade union is not an ‘association’ according to the definition of national law, it may fall within Article 11. The term connotes a voluntary association, not a professional organization established by the Government. However, freedom of association also implies protection against compulsory membership of an association.

The right to join a trade union involves allowing members to have a union that can properly ‘protect the interests of the members’. This right can be subject to the restrictions of the national legislation. Moreover, extra restrictions may be placed on certain groups of employees under the second paragraph 2.

11) Marriage and family

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.⁴⁷² This Article obviously does not confer an absolute right due to the

⁴⁷¹ Article 11

⁴⁷² Article 12

words ‘according to the national laws’, which imply the reverse of an absolute right. The State can impose restrictions on certain men and women due to the social purpose of Article 12 which is concerned with the ability to procreate; marriages which cannot result in procreation may, therefore, fall outside its ambit. This interpretation was supported on the ground that the wording of the Article suggests that marriage is protected on the basis of the family; thus, Article 12 is aimed at protecting the traditional biological marriage.

If a person is in general free to marry but in particular circumstances will suffer detriment, flowing solely from the fact of being married, Article 12 may be breached. Thus, the right to marry may include placing no sanction on marriage such as sacking a person when he or she marries.

In accordance with the general Convention policy of reluctance to impose positive obligations on States, the right to found a family does not include an economic right to sufficient living accommodation for the family.

Even prisoners have the right to marry; inherent restrictions are possible but they must not affect the essence of the right. When the applicant had two years to wait, it did affect the essence of the right and, therefore, led to a breach of this right.

12) Effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated, shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.⁴⁷³

This machinery may include a number of possible remedies. It has been held that judicial review proceedings will be sufficient.

The remedy is required if the substantive rights or freedoms are in question; however, the words do not and cannot connote a requirement that there should be domestic machinery in place to address any possible grievance.

⁴⁷³ Article 13

13) Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.⁴⁷⁴

Article 14 does not provide a general right to freedom from discrimination but only that the rights and freedoms of the Convention must be secured without discrimination.

Under Article 14 discrimination connotes differential treatment which is unjustifiable. The differential treatment may be unjustifiable either in the sense that it relates to no objectives and reasonable aim, or in the sense that there is no reasonable proportionality between the means employed and the aim sought to be realized.

3. Rights under Protocols

Various Protocols have been added to the Convention and some create additional rights:

1) Protocol No. 1

- a. Every natural or legal person is entitled to the peaceful enjoyment of his possessions and no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. However, this shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.
- b. No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.
- c. The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

2) Protocol No. 4

⁴⁷⁴ Article 14

- a. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence and everyone shall be free to leave any country, including his own. Furthermore, no restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. Similarly, no one shall be deprived of the right to enter the territory of the State of which he is a national.
- b. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national and sigillary, collective expulsion of aliens is also prohibited.

3) **Protocol No. 6**

- a. The death penalty shall be abolished and no one shall be condemned to such penalty or executed.
- b. A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions.
- c. No derogation and no reservation from the provisions of this Protocol shall be made.

4) **Protocol No. 7**

- a. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law.
- b. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
- c. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
- d. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has

already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

- e. Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This article shall not prevent States from taking such measures as are necessary in the interests of the children.

5) Protocol No. 12

- a. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- b. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

6) Protocol No. 13

- a. The death penalty shall be abolished and no one shall be condemned to such penalty or executed.
- b. No derogation and reservation from the provisions of this Protocol shall be made the Convention.

4. Restriction on Rights and Freedoms

The Convention sets out the following limitations and conditions on the exercise of the rights detailed in the Convention:

1) Public emergency

In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.⁴⁷⁵

Article 15 allows derogation in respect of most but not all of the Articles. Derogation from Article 2 (right to life) is not allowed except in respect of death resulting from lawful acts of war, while Articles 3, 4(1) and 7 are entirely non-derogatory.

⁴⁷⁵ Article 15

Apart from these exceptions, a valid derogation requires the State in question to show that there is a State of war or public emergency, and in order to determine the validity of this claim two questions should be asked:

Firstly, is there an actual or imminent exceptional crisis threatening the organized life? Secondly, is it really necessary to adopt measures that require derogation from the Articles in question? A margin of discretion is allowed in answering these questions.

2) Political activity of aliens

There can be more restrictions on the political activities of the aliens than those on citizens as nothing in Articles 10, 11 and 14 can be regarded as preventing the member states from imposing restrictions on the political activity of aliens (Article 16).

Since Article 16 implies that restrictions over and above those already imposed due to the second paragraphs of Articles 10 and 11 can be imposed on aliens in respect of their enjoyment of the freedoms as far as their political activity is concerned, it means that restrictions can be imposed only if they relate to political activities.

3) Destruction of rights

Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention (Article 17).

The Article prevents a person relying on a Convention right where his or her ultimate aim is the destruction or limitation of Convention rights. Its 'restriction' applies to all the rights and freedoms. Thus, Article 17 must be read in conjunction with all the Articles.

4) Margin of appreciation

Under this doctrine, a degree of discretion will be allowed to member states as to the means adopted to protect certain interests although such

means may affect Convention rights by restricting them. However, Strasbourg (European Court of Justice) will finally determine whether such restriction is reconcilable with the right in question.

The courts see whether it was exercised in good faith and carefully and whether it was reasonable in the circumstances. The approach of the court may depend on the following factors:

- (a) The nature of the right in question;
- (b) The wording of the requirements in question; and
- (c) The positive obligations placed on the State.

In general, the margin of appreciation doctrine clearly has the power to undermine the Convention and, therefore, its growth has been criticized. Some critics call it 'a spreading disease'.

Chapter Nineteen

AMERICAN SYSTEM OF HUMAN RIGHTS

1. Introduction

At the ninth Inter-American Conference at Bogota in 1948, the American States undertook a review of their methods of cooperation and reorganized the whole system. The 'Charter of Bogota' adopted on this occasion furnished the new constitutional instrument that was needed and thereby established the Organization of American States (OAS). The Charter announces in its first Article that the OAS is a regional agency within the United Nations. It then continues by laying down the essential purposes of the Organization. Next come two important chapters on 'Principles' and 'Fundamental Rights and Duties of States'. These affirm the significance of international law and fundamental human rights.

Another basic text adopted at Bogota was the American Declaration on the Rights and Duties of Man. While it is, for the most part, on rather similar lines to the Universal Declaration of the United Nations, it is worth noting that it was adopted in May 1948, that is to say, seven months before the Universal Declaration, and that it contains no less than ten Articles setting out the duties of the citizens, in addition to twenty-eight Articles proclaiming individual rights.

A meeting of the ministers for foreign affairs, held at Santiago in 1959, resulted in further initiatives in the field of human rights. The Ministers adopted a 'Conclusion' containing the following statement: eleven years after the American Declaration of the Rights and Duties of Man was proclaimed, the climate in the hemisphere is ready for the conclusion of a Convention. The same document instructed the Inter-American Council of Jurists to prepare a draft Convention on Human Rights and a draft Convention for the creation of an Inter-American Court for the Protection of Human Rights, along with other appropriate organs. It also resolved to create an Inter-American Commission on Human Rights of seven members elected as individuals by the Council of the OAS from panels of three candidates presented by the governments.

Accordingly, the Inter-American Council of Jurists met in Santiago later in the year and prepared a draft Convention, which was largely based on the European model. This draft Convention was considered at their Second Special Inter-American Conference held in Rio de Janeiro in 1965.⁴⁷⁶

In October 1968, the Council of the OAS submitted the revised draft Convention prepared by the Inter American Commission on Human rights, inviting comments from governments. When these had been received a Special conference on Human Rights was held in San Jose, Costa Rica, in November 1969, to produce a final text. Nineteen of the twenty-four member States of the OAS were represented at the Conference.

The American Convention on Human Rights (the Convention), otherwise known as the 'Pact of San Jose', was approved at this Conference and signed on 22nd November 1969.⁴⁷⁷ It entered into force on 18th July 1978, and has now been widely accepted. In 1988, an additional Protocol was concluded which extended the range of rights protected, and two years later a further Protocol was added to abolish the death penalty.

2. Rights Protected

The undertaking of the States under the Convention is to 'ensure to all persons, subject to their jurisdiction, the free and full exercise of the rights and freedoms recognized therein.'⁴⁷⁸ Article 2 provides that contracting parties will adopt such legislative or other measures, as may be necessary in cases where the rights and freedoms are not already ensured in their domestic law.

Twenty-six rights and freedoms are protected by the Convention. Twenty-one of these are included in the UN Covenant on Civil and Political Rights. They are:

- 1) The right to life;
- 2) Freedom from torture;

⁴⁷⁶ Robertson and Merrills, *Human Rights in the World*, p.200

⁴⁷⁷ Brownlie, *Documents on Human Rights*, Oxford, 1992, p. 495

⁴⁷⁸ Article 1 of the American convention on Human Rights (ACHR)

- 3) Freedom from slavery;
- 4) Right to liberty and security;
- 5) Right to a fair trial;
- 6) Freedom from retroactivity;
- 7) Right to respect for family life;
- 8) Freedom of conscience;
- 9) Freedom of thought;
- 10) Freedom of assembly;
- 11) Freedom of association;
- 12) Freedom to found a family;
- 13) Freedom of movement;
- 14) Right to free elections;
- 15) Right to an effective remedy;
- 16) Right to recognition before law;
- 17) Right to compensation;
- 18) Right to a name;
- 19) Rights of the child;
- 20) Right to nationality; and
- 21) Right to equality before law.

The five rights and freedoms included in the Convention but not in the United Nations' covenant are:

- 22) Right of property;
- 23) Freedom from exile;
- 24) Prohibition of collective expulsion of aliens;
- 25) Right of reply; and

26) Right of asylum.⁴⁷⁹

3. Comparison with others

A comparison of the provisions of the American Convention with those of the European Convention and its Protocols reveals that the principal rights included in the American but not in the European text are: the right of reply, the rights of the child, the right to a name and to a nationality, and the right of asylum. On the other hand, the right to education, contained in Protocol No. 1 to the European Convention, was omitted from the American text.

The definitions of the American Convention are generally closer to those of the United Nations Covenant on Civil and Political Rights than to the European Convention, though there are several differences, which are sometimes due to following the European model.

It will be noted that the Convention contains no guarantees of economic, social and cultural rights like those to be found in the first UN Covenant and the European Social Charter. Instead, there is merely a general undertaking in Article 26 to adopt measures to achieve the full realization of the rights implicit in the corresponding standards of the OAS Charter. IN 1988, the Additional Protocol, known as the 'Protocol of San Salvador', was therefore concluded with a view to improve matters.⁴⁸⁰

The new Protocol guarantees thirteen additional economic, social and cultural rights and has much in common with the first UN Covenant. As in the Covenant, the rights concerned are protected by a reporting system, but an important difference is that they are also subject to the jurisdiction of the Inter-American Commission and Court through the same system of individual petitions.

⁴⁷⁹ However, the Covenant provides in Article 12 that 'No one shall be arbitrarily deprived of the right to enter his own country'.

⁴⁸⁰ I. Brownlie, (op. cited) at p. 521

As already mentioned, in 1990, a further Protocol was concluded which has the effect of prohibiting the States, which are parties to it from using the death penalty. This brings the American Convention into line with the European Convention on Human Rights and the Covenant on Civil and Political Rights. As yet, however, neither this latest Protocol nor the Protocol of San Salvador has been generally accepted.

The provision in the UN Covenant on the Rights of Minorities⁴⁸¹ has no counterpart in the American Convention.

4. Inter-American Commission

The Convention provides for two organs of control: a Commission and a Court. The Convention was not creating a new organ but conferring new functions and powers on an existing body as the Inter-American Commission had been created in 1959, by Resolution VIII of the meeting of ministers for foreign affairs at Santiago. As a result of this evolution the 1969 Convention was able to confer new functions and powers on the existing Inter-American Commission, but, of course, the new provisions would apply only to States, which ratified the new Convention. It was, therefore, also necessary to provide that the existing functions and powers of the Commission would remain and continue to be exercised in relation to States, which did not ratify the new Convention.

In 1959, the Inter-American Commission drew up a Statute, which was approved by the OAS Council in 1960. The Statute gave the Commission power to examine the human rights situation in OAS member States where flagrant and repeated violations were occurring; to request pertinent information from the governments concerned and, if necessary, to request their consent to visit their territory; to make such visits if the necessary consent was obtained; to put forward any recommendations it thought advisable; and to prepare reports. It was not competent to take decisions on individual complaints of violation of human rights, but it could take account of such complaints as sources of information on the state of human rights in the countries concerned.

⁴⁸¹ Gandhi, *International Human Rights Documents*, p. 170

The competence to consider individual complaints of violation of a limited number of specific rights was conferred on the Commission, by the Rio Conference in 1965, and the Statute was amended accordingly. Using these provisions the Inter-American Commission has examined the situation of human rights in a considerable number of the Latin American republics. The Commission has adopted a rule to the effect that once a communication has been declared admissible the facts alleged will be presumed to be confirmed if the government concerned fails to bring forward convincing evidence in rebuttal.

The European Commission has been concerned with what might be called the finer points of human rights law – questions, for example, such as what is a reasonable time in detention pending trial, what is the precise content of the right to a fair trial, what limitations may be placed on freedom of expression, and what exactly are the implications of the right of freedom of association? The Inter-American Commission, on the other hand, has had to deal with problems of a quite different order; arbitrary arrest on a massive scale, systematic use of torture, scores or hundreds of ‘disappeared persons’, total absence of judicial remedies, and other flagrant violations of civilized standards.

The new functions of the Commission are set out in Articles 44-47. It is competent to consider petitions from individuals, groups of individuals or NGOs alleging violation of the Convention by States Parties.⁴⁸² In contrast to Article 25 of the European Convention, acceptance of this competence by States ratifying the treaty is not optional but obligatory. In terms of the provision of effective international procedures for protecting human rights, the compulsory jurisdiction of the Commission under Article 44 is the outstanding feature of the American Convention.

The rules on admissibility are generally similar to those contained in the European Convention.⁴⁸³ They include the requirement of exhaustion of domestic remedies and require that the petition should be filed within six months of the notification of the final domestic decision.

⁴⁸² Article 44 of ACHR

⁴⁸³ Article 46 and 47

Once the Commission has decided that a case is admissible, its first task is to establish the facts. It may undertake an investigation, for which the States concerned will furnish all necessary facilities.⁴⁸⁴ An urgent procedure for emergency cases is set out in Article 48(2). The Commission can try to bring about a friendly settlement. The procedure⁴⁸⁵ is broadly similar to that of the European Convention. If no friendly settlement is achieved, the Commission is required to draw up a report setting out the facts and stating its conclusion and may make such proposals and recommendations, as it thinks fit.⁴⁸⁶

5. American Court

The Inter-American Court of Human Rights (the Court) consists of seven judges, elected in an individual capacity from among jurists of the highest moral authority and recognized competence and who possess the qualifications required for the highest judicial office.⁴⁸⁷ Only the parties to the Convention may propose candidates and take part in election. However, candidates may be of the nationality of any member State of the OAS. The judges are elected for a term of six year, and may be re-elected, but only once.⁴⁸⁸ Costa Rica is the seat of the Court.

Article 55 of the Convention deals with the question of the ‘national judge’, that is, whether a judge who is a national of a party to a case should have the right to sit in a case in which his or her own country is involved. It allows the traditional system of national and ad hoc judges. The Commission also appears in all cases before the Court.⁴⁸⁹

The Court appoints its own Secretary.⁴⁹⁰ Article 59 provides that the Court shall establish its own secretariat, which functions under the direction of the Secretary of the Court.

⁴⁸⁴ Article 48(1)(d)

⁴⁸⁵ Article 48(1)(f) and 49

⁴⁸⁶ Article 50

⁴⁸⁷ Article 52

⁴⁸⁸ Article 54

⁴⁸⁹ Article 57

⁴⁹⁰ 4. Article 58

Only States Parties and the Commission may submit cases to the Court.⁴⁹¹ Under Article 62 of the Convention, contracting parties may declare that they accept the jurisdiction of the Court un-conditionally or on condition of reciprocity, and for an indefinite or for a limited period.

The powers of the Court are very wide and much more extensive than those of the European Court of Human Rights. If it finds that there has been a violation, it may order that the rights of the injured party are reinstated and, where appropriate, can also order that the consequences of a violation should be remedied and damages paid.⁴⁹²

Article 64 of the Convention invests the Court with wide powers to give advisory opinions. Requests for advisory opinion may relate not only to the Convention, but also to other treaties concerning the protection of human rights in the American States.⁴⁹³

6. Other regional arrangements

In recent years, a number of further conventions of this type have been negotiated. The Inter-American Convention to Prevent and Punish Torture was concluded in 1985, one year after the United Nations Convention on the subject.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women entered into force in March 1995.⁴⁹⁴ The Convention defines violence against women as including physical, sexual and psychological violence.⁴⁹⁵ It lists key rights of women and imposes a range of duties on the States Parties, intended to eliminate violence against women and its causes.

A threefold mechanism of protection is envisaged. In the first place, States undertake to report to the Inter-American Commission of Women on

⁴⁹¹ Article 61

⁴⁹² Article 63

⁴⁹³ Buergenthal, *The advisory Practice of the Inter-American Human rights Court*, *Amer J of Inter Law*, LXXIX, 1985, p.1

⁴⁹⁴ Bownlie, *op. Cited*. P. 531

⁴⁹⁵ Article 2 of the Convention on Prevention of violence against Women

their measures to implement the Convention.⁴⁹⁶ Secondly, the States Parties and the Inter-American Commission of Women are authorized to seek advisory opinions from the Inter-American Court⁴⁹⁷ and thirdly, individuals and NGOs may lodge petitions with the Inter-American Commission concerning those obligations, which required immediate implementation. The other recent convention is the Inter-American Convention on the Forced Disappearance of Persons.

The developments just described are symptomatic of a renewed emphasis on human rights in the OAS, following the replacement of the military regimes which were responsible for so many of the abuses described in this chapter with governments of a more democratic character in a significant number of member States.

⁴⁹⁶ Article 10 of *ibid.*

⁴⁹⁷ Article 11, *ibid.*

Chapter Twenty

PEOPLES' RIGHTS IN AFRICAN

1. Introduction

The African Charter on Human and Peoples' Rights, 1981 (African Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.⁴⁹⁸ The African Charter differs considerably from other regional counterparts, both in the catalogue of rights protected and in the means of implementation and protection. This is because it was drafted to take account of African political culture and legal philosophy, and is specifically directed towards African needs, which can easily be observed from the preamble of the African Charter.

There is a remarkable resemblance between the African Charter and the Universal Declaration of Human Rights (UDHR). The preamble to the Charter reaffirms the pledge of African states to promote international cooperation having due regard to the Charter of the UN and the UDHR. The African Charter also incorporates civil, political and socio-economic rights in the single instrument. Nonetheless, such approach was not followed in the same line in the binding UN human rights instruments (ICCPR & ICESCR). Therefore, the first area in which the African Charter differs from others is that not only does the Charter seek to protect individual civil and political rights, it also seeks to promote and protect within the single instrument, economic, social and cultural rights and a category of certain third generation rights.

The African Charter is the only regional human rights instrument to incorporate what are called third generation rights or 'rights of solidarity.' The African Charter is also known for its incorporation of the concept of individual duties. This concept was first included in the non-binding American Declaration of the Rights and Duties of Man of 1948 and to some extent under article 29 (1) of the UDHR. However, it is only in the African Charter that duties are imposed on individuals as a matter of international legal obligation. Most of the rights contained in the Charter thus have a correlative duty attached to them.

Some of the substantive provisions of the African Charter are equivocally phrased or used in very general terms, which may give rise to varying interpretations and avoidance of the obligations under the Charter. Apart from that

⁴⁹⁸ <http://www.achpr.org/instruments/achpr/>

a distinguishing feature of African Charter is the absence of provisions permitting derogation from suspension of the rights protected in exceptional circumstances.

The civil and political rights, which are protected by Articles 2-15, comprise the traditional range of rights that are included in the ICCPR and the other regional instruments. The economic and social rights contained in the Charter also largely reflect the range of such rights in other international instruments. However, there are a number of additions, which are worthy of note.⁴⁹⁹

Oversight and interpretation of the Charter is the task of the African Commission on Human and Peoples' Rights, which was set up in 1987, and is now headquartered in Banjul, Gambia. A protocol to the Charter was subsequently adopted in 1998, whereby an African Court on Human and Peoples' Rights was to be created. The protocol came into effect on 25th January 2005.

2. Rights guaranteed

Following are the rights guaranteed in the African Charter:

1) Right to freedom from discrimination

Article 2 of the African Charter provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

This right is also enshrined in Article 5 of the UDHR, Article 7 of the ICCPR, Article 2 and 10 of the ICESCR, Article 37 of the CRC, Article 15 of the CRPD, and Article 1 of the CAT.

2) Right to equal protection of law

Article 3 of African Charter provides that every individual shall be equal before the law and every individual shall be entitled to equal protection of the law. Equality before the law is the principle that each independent being must be treated equally by the law and that all are subject to the same laws. Therefore, the law must guarantee that neither individual nor group of individuals should be privileged or discriminated against by the government.⁵⁰⁰

⁴⁹⁹ <https://www.abysinnialaw.com/about-us/item/361-the-distinctive-feature-of-the-african-charter>

⁵⁰⁰ Thucydides, *The History of the Peloponnesian War*, Written 431 BCE, Translated by Richard Crawley (1874), retrieved via Project Gutenberg.

This right is also protected by Article 7 of the UDHR, Article 14 of the ICCPR, Articles 12, 37 and 40 of the CRC and Articles 16, 18, and 83 of the CRMW.

3) Right to life

Article 4 of African Charter provides that human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of this right.

The right to life is a moral principle based on the belief that a human being has the right to live and, in particular, should not be killed by another human being. The concept of a right to life arises in debates on issues of capital punishment, war, abortion, euthanasia, justifiable homicide, animal welfare and public health care.⁵⁰¹

Further this right is enshrined in Article 3 of the UDHR, Article 6 of the ICCPR, Article 6 of the CRC, and Article 11 of the CMW, and Article 10 of the CRPD.

4) Prohibition of torture

Article 5 of the African Charter provides that every individual shall have the right to respect of the dignity inherent in a human being and to recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

This right is also protected by Article 5 of the UDHR, Article 7 of the ICCPR, Article 37 of the CRC, Article 15 of the CRPD and the entire Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is dedicated to protecting this human right.

5) Right to personal liberty

Article 6 of the African Charter provides that every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

⁵⁰¹ Solomon, Martha. “*The Rhetoric of Right to Life: Beyond the Court’s Decision*”. Archived 2009-07-24 at the Wayback Machine. Paper presented at the Southern Speech Communication Association

This right can also be found in Article 9 of the UDHR, Article 9 and 11 of the ICCPR, Article 37 of the CRC, and Article 16 and 20 of the CMW.

6) Right to fair trial

Article 7 of the African Charter provides that every individual shall have the right to have his cause heard. This comprises:

- (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- (b) the right to be presumed innocent until proved guilty by a competent court or tribunal, the right to defense including the right to be defended by counsel of his choice and the right to be tried within a reasonable time by an impartial court or tribunal;
- (c) no one shall be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed; and
- (d) no penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

This right is also enshrined in Article 10 of the UDHR, Article 14 of the ICCPR, Article 12, 37 and 40 of the CRC, and Article 16, 18, 83 of the CMW.

7) Right to freedom of conscience

Article 8 of the African Charter provides that Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Freedom of conscience, sometimes called ‘freedom of worship’ or ‘religious freedom,’ means simply the freedom to worship in one’s own way, including the right not to worship. It could also be simplified to a single word i.e. ‘co-existence.’⁵⁰²

This right is also secured by Article 18 of the UDHR, Article 18 and 27 of the ICCPR, and Articles 2, 14 and 30 of the CRC.

8) Right to free expression

⁵⁰² <http://www.findingrogerwilliams.com/five-pillars/page-intro-text/respect-for-others-beliefs>

Article 9 of the African Charter provides that every individual shall have the right to receive information. Every individual shall have right to express and disseminate his opinions within the law.

Freedom of information is an extension of freedom of speech, a fundamental human right recognized in international law, which is generally understood as freedom of expression. Freedom of information also refers to the right to privacy in the content of the Internet and information technology. As with the right to freedom of expression, the right to privacy is a recognized human right and freedom of information acts as an extension to this right.

This right is also enshrined in Article 19 of the UDHR, Article 19 and 20 of the ICCPR, Article 12 and 13 of the CRC, Article 13 of the CMW, and Article 21 of the CRPD.

9) Right to freedom of association

Article 10 of the African Charter provides that every individual shall have right to free association provided that he abides by the law. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.⁵⁰³

Every individual shall have right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.⁵⁰⁴

Freedom of association and assembly encompasses both an individual's right to join or leave groups voluntarily, right of a group to take collective action to pursue interests of its members, and right of an association to accept or decline membership based on certain criteria. Freedom of association is both an individual right and a collective right, guaranteed by all modern and democratic legal systems.

The right to freedom of association and assembly is enshrined in Article 20 of the UDHR, Article 21 and 22 of the ICCPR, and Article 15 of the CRC.

10) Right to freedom of movement

⁵⁰³ Article 10 of ACHPR

⁵⁰⁴ Article 11 of ACHPR

Article 12 of the African Charter provides that every individual shall have right to freedom of movement and residence within borders of a State provided he abides by the law.

Every individual shall have right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

Every individual shall have right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Freedom of movement, mobility rights, or the right to travel is a human rights concept encompassing the right of individuals to travel from place to place within the territory of a country, and to leave the country and return to it. The right includes not only visiting places, but also changing the place where the individual resides or works. Freedom of movement within a country encompasses both rights; to travel freely within the territory of the State and right to relocate oneself and to choose one's place of residence.⁵⁰⁵

This right is also enshrined in Article 13 of the UDHR, Article 12 of the ICCPR, Article 10 of the CRC, Article 5, 8 and 39 of CMW, and Article 9 and 18 of the CRPD.

11) Right to participate in government

Article 13 of the African Charter provides that every citizen shall have right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. Every citizen shall have the right of equal access to the public service, public property and services in strict equality of all persons before the law.

⁵⁰⁵ Jérémie Gilbert, *Nomadic Peoples and Human Rights* (2014), p. 73. Freedom of movement within a country encompasses both the right to travel freely within the territory of the State and the right to relocate oneself and to choose one's place of residence.

The foundations of the right to participation are shaped by the possibility of any individual to be involved in decision-making, which affects her/his interests. Everyone should be able to participate in society, to defend her/his interests, to help create a society, which also fulfil her/his interests and desires. The freedom to vote and stand for elections and the freedoms of association and assembly are the major political expressions of such participation. These rights form the bases for any representative, democratic process and active civil society, and ensure that public affairs are truly public. The right to participation in government is also intricately linked with other rights, such as the right to education and the right to freedom of conscience and religion.⁵⁰⁶

This right is also protected by Article 21 of the UDHR, Article 25 of the ICCPR, Article 7, 8 and 11 of the CEDAW, and Article 29 of the CRPD.

12) Right to property

Article 14 of the African Charter provides that right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in general interest of the community and in accordance with provisions of appropriate laws.

This right is also enshrined in Article 17 of the UDHR, Article 2 of the IESCR and Article 15, 21, and 32 of the CMW.

13) Right to work

Article 15 of the African Charter provides that every individual shall have right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.

A right to work law secures the right of employees to decide for them whether or not to join or financially support a union. The right to work is the concept that people have a human right to work, or engage in productive employment, and may not be prevented from doing so.

This right is also enshrined in Article 23 of the UDHR, Article 6 of the ICESCR, Article 11 of the CEDAW and Article 27 of the CRPD, and many Articles of the CMW.

14) Right to health

⁵⁰⁶ <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-participate-in-society>

Article 16 of the African Charter provides that every individual shall have right to enjoy the best attainable state of physical and mental health. The right to the highest attainable standard of health implies a clear set of legal obligations on states to ensure appropriate conditions for the enjoyment of health for all people without discrimination.

The right to health is one of a set of internationally agreed human rights standards, and is inseparable or ‘indivisible’ from these other rights. This means achieving the right to health is both central to, and dependent upon, the realization of other human rights, to food, housing, work, education, information, and participation.⁵⁰⁷

This right is also enshrined in Article 25 of the UDHR, Article 11 of the ICESCR, Article 27 of the CRC, Article 14 of the CEDAW, Article 43 of the CMW, and Article 28 of the CRPD.

15) Right to education

Article 17 of the African Charter provides that every individual shall have right to education and every individual may freely take part in the cultural life of his community. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

The right to education has been recognized as a human right in a number of international conventions, including the International Covenant on Economic, Social and Cultural Rights which recognizes a right to free, compulsory primary education for all, an obligation to develop secondary education accessible to all, in particular by the progressive introduction of free secondary education, as well as an obligation to develop equitable access to higher education, ideally by the progressive introduction of free higher education.

This right is also enshrined in Article 26 of the UDHR, Articles 10, 13 and 14 of the ICESCR, Articles 23, 28, 29 and 40 of the CRC, Articles 5, 10, 14 and 16 of the CEDAW, Articles 31, 34, 43 and 45 of the CMW, and Article 24 of the CRPD.

16) Protection of the family

Article 18 of the African Charter provides that the family shall be the natural unit and basis of society. It shall be protected by the State, which shall take care of

⁵⁰⁷ <https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>

its physical health and moral. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community; the State shall ensure the elimination of discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

This right is also enshrined in Article 16 of the UDHR, Article 23 of the ICCPR, Article 10 of the ICESCR, Articles 4, 13, 44, 50 of the CMW, Articles 9, 11 and 16 of the CEDAW, and Article 23 of the CRPD.

17) Right of all peoples to equality

Article 19 of the African Charter provides that all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another. Equality affirms that all human beings are born free and equal. Equality presupposes that all individuals have the same rights and deserve the same level of respect. All people have the right to be treated equally. This means that laws, policies and programs should not be discriminatory, and also that public authorities should not apply or enforce laws, policies and programmes in a discriminatory or arbitrary manner.

18) Right to self-determination

Article 20 of the African Charter provides that all peoples shall have right to existence. They shall have unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. Colonized or oppressed peoples shall have the right to free themselves from bonds of domination by resorting to any means recognized by the international community. All peoples shall have right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

Essentially, the right to self-determination is the right of a people to determine its own destiny. In particular, the principle allows a people to choose its own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. The

importance lies in the right of choice, so that the outcome of a people's choice should not affect the existence of the right to make a choice.

In practice, however, the possible outcome of an exercise of self-determination will often determine the attitude of governments towards the actual claim by a people or nation. Thus, while claims to cultural autonomy may be more readily recognized by states, claims to independence are more likely to be rejected by them. Nevertheless, the right to self-determination is recognized in international law as a right of process (not of outcome) belonging to peoples and not to states or governments.

Article 1 in the ICESCR and Article 1 in the ICCPR were adopted following the United Nations Charter and these also reinstated the right of self-determination to the people. The concept was further elaborated in the adoption of the Friendly Relations Declaration in 1970.

19) Right to free disposal resources

Article 21 of the African Charter provides that all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

The Commission on Permanent Sovereignty over Natural Resources in 1985, instructed to conduct a full survey of the status of permanent sovereignty over natural wealth and resources in Africa as a basic constituent of the right to self-determination, with recommendations. It was decided that in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of developing countries.⁵⁰⁸

20) Right to economic, social and cultural development

⁵⁰⁸ <https://www.ohchr.org/EN/ProfessionalInterest/pages/NaturalResources.aspx>

Article 22 of the African Charter provides that all peoples shall have right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Economic, social, and cultural development include the development of right to work, the right to an adequate standard of living, including food, clothing, and housing, the right to physical and mental health, the right to social security, the right to a healthy environment, and the right to education.

The right to participate in cultural life is enshrined in Article 27 of the UDHR. The right is also enshrined in Article 27 of the ICCPR, Articles 20, 29, 30 and 31 of the CRC, Article 13 of the CEDAW, and Article 30 of the CRPD. The ICESCR completely covers all aspects of this right including economic, social and cultural aspects.

21) Right to security and peace

Article 23 of the African Charter provides that all peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States. Their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.

National security today includes security of the society, regardless of ethnic, ethical, racial and ideological origin or commitment of its members, and security of the state, but also their participation in international and global security. It involves a certain condition of protection of their vital interests and values, which is optimized by the function of military and civilian, state and non-state sector of the national security system, with relying on numerous international subjects in many aspects of international cooperation in the field of security. Entities at all levels of security - individuals, societies, states, and the international community - participate in the protection of national security. States still have all resources; human, material-technical and organizational for the protection of all levels of security against most challenges, risks and threats.

The right to a social and international order is enshrined in the UDHR. The right is mentioned in various portions of the ICCPR, particularly under Articles 7, 12, 13 and 21.

22) Right to satisfactory environment

Article 24 of the African Charter provides that all peoples shall have the right to a general satisfactory environment favourable to their development. **Duties**

3. Duties of the people

The African Charter provides that the States Parties and individuals are duty bound to perform certain functions for the enforcements of rights provided in the African Charter. Following are the duties to be performed by the Sates Parties and the individuals:

1) Duty to promote human rights

Article 25 of the African Charter provides that States Parties shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Under international human rights law, the state not only has the obligation to avoid prevent and remedy human rights abuses, it must also do its utmost to advance awareness and acceptance of human rights. Human rights education is an integral part of the duties of human rights themselves. States bear the burden of promoting a culture of human rights and challenge beliefs that run counter to human rights through education, public awareness and other means, as well as ensuring the broadest access to knowledge and information about human rights standards and principles.

2) Duty to guarantee independence of courts

Article 26 of the African Charter provides that States Parties shall have duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

The independence of the judiciary shall be guaranteed by the State and shall be enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper

influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.⁵⁰⁹

3) Individual's duty towards family

Article 27 of the African Charter provides that every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Since individuals constitute society, they form the units of society. As a member or unit of society or the state, a man must behave in a way which is good for all and which is helpful in promoting the welfare of society. Society calls upon the individuals to follow certain norms. These are obligations or duties.⁵¹⁰

If the state guarantees the enjoyment of certain rights to individuals, the state, at the same time, requires from individuals to perform certain duties. Individuals have certain moral duties to perform and certain legal duties, which we are bound to perform.⁵¹¹

4) Duty to respect

Article 28 of the African Charter provides that every individual shall have duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

The rights of one are the duties of the other and vice versa. In the absence of duties rights become insignificant and duties are fruitless in the absence of rights. If we have right to enjoy our rights, it is our cardinal duty to perform our duties.

5) Duty to preserve harmonious development

Article 29 of the African Charter provides that the individuals shall also have the duty:

- (a) to preserve the harmonious development of the family and to work for the cohesion and respect of the family;

⁵⁰⁹ Basic Principles on the Independence of the Judiciary - General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

⁵¹⁰ Moral and Legal Duties of Individuals towards Society

⁵¹¹ http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html

- (b) to respect his parents at all times, to maintain them in case of need;
- (c) to serve his national community by placing his physical and intellectual abilities at its service;
- (d) to work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society; and
- (e) to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society.

4. Enforcement mechanism

1) African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (the Commission) was established under Article 30 of the African Charter and became operational on 21st October 1986. The Commission reports to the Assembly of Heads of State and Government of the African Union (AU).

The Commission is made up of eleven members, elected by secret ballot by the AU's Assembly. These members, who serve six-year renewable terms, are 'chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights' and, in selecting these personalities, particular consideration is given to persons having legal experience.'⁵¹²

Article 45 of the Charter enumerates the functions of the Commission to be:

- (a) the promotion of human and peoples' rights;
- (b) the protection of human and peoples' rights;
- (c) interpretation of the provisions of the Charter; and
- (d) any other task assigned to it by the OAU Assembly.

In pursuit of these goals, the Commission is mandated to collect documents, undertake studies and researches on African problems in the field of human and peoples, rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and

⁵¹² Article 31 of the African Charter

peoples' rights and, should the case arise, give its views or make recommendations to governments.⁵¹³

The members are to enjoy full independence in discharging their duties and serve on a personal basis (i.e., not representing their home states); however, no member state may have more than one of its nationals on the Commission at any given time. The members choose, from among their own number, a chairperson and a Vice Chairperson, who each serve two-year renewable terms. The Commission meets twice a year. One of these meetings is usually in Banjul, where the Commission's secretariat is located; the other may be in any African state.

The Commission is a quasi-judicial body tasked with promoting and protecting human rights and collective rights throughout the African continent as well as interpreting the African Charter and considering individual complaints of violations of the Charter. This includes investigating human rights violations, creating and approving programs of action towards encouraging human rights, and set up effective communication between them and states to get first-hand information on violations of human rights.⁵¹⁴

Although the Commission is under a regional government facility, it did not have any actual power and enforcement over laws. It ends up in drafting up proposals to send up the chain of command to the Assembly of Heads of State and Government and they will act accordingly.⁵¹⁵

The Commission has jurisdiction over the rights set out in the African Charter. Its duties include examining national reports on the situation of human rights which each State is required to submit every other year, adopting resolutions and declarations, country visits, and adjudicating communications (complaints) submitted by Member States, individuals, and NGOs.

The Commission has also developed a system of 'Special Measures' consisting of Special Reporters to whom specific allegations of human rights

⁵¹³ Article 45 of the African Charter

⁵¹⁴ Welch, Claude (December 1991). "Organisation of African Unity and the Promotion of Human Rights". *The Journal of Modern African Studies*.

⁵¹⁵ Odinkalu, Anselm (August 1993). "Proposals for Review of the Rules of Procedure of the African Commission of Human and Peoples' Rights". *Human Rights Quarterly*.

violations in specific areas may be brought, and Working Groups that monitor and investigate specific questions linked to the Commission's work.⁵¹⁶

With the creation of the African Court on Human and Peoples' Rights (under a protocol to the Charter adopted in 1998, which entered into force in January 2004), the Commission can also submit cases to the Court.⁵¹⁷

States Parties, individuals, or NGOs may bring communications to the Commission, alleging that a State Party has violated a provision of the Charter. When an individual or NGO submits a complaint to the Commission, they must first exhaust any domestic remedies which exist, 'unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.' Communications must be submitted within a reasonable time after local remedies were exhausted, must not be based exclusively on news from the mass media, and must not be written in a way which insults or disparages the State or the AU. Individuals may request confidentiality.⁵¹⁸

2) African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (the Court) is a continental court established by African countries to ensure the protection of human and peoples' rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples' Rights.

The Court is established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (the Protocol) which was adopted by Member States of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso, in June 1998. The Protocol came into force on 25th January 2004.

As now, only eight of the thirty States Parties to the Protocol had made the declaration recognizing the competence of the Court to receive cases from NGOs and individuals.

The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and

⁵¹⁶ <https://www.opensocietyfoundations.org/fact-sheets/african-commission-human-and-peoples-rights>

⁵¹⁷ Welch, Claude (February 1992). "The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment". *Human Rights Quarterly*.

⁵¹⁸ <https://www.opensocietyfoundations.org/fact-sheets/african-commission-human-and-peoples-rights>

Peoples' Rights, the Protocol and any other relevant human rights instrument ratified by the States concerned.

Part V**SPECIAL INTERESTS IN HUMAN RIGHTS**

Chapter Twenty-One

INTERNATIONAL HUMANITARIAN LAW

1. Introduction

International Humanitarian Law (IHL) is a set of rules, which seek, for humanitarian reasons, to regulate the conduct of war to limit the effects of armed conflict by protecting persons who are not participating in hostilities, and by restricting and regulating the means and methods of warfare. Universal codification of international humanitarian law began in the nineteenth century. Since then, States have agreed to a series of practical rules, based on the bitter experience of modern warfare. These rules strike a careful balance between humanitarian concerns and the military requirements of States.⁵¹⁹

It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict. International humanitarian law is part of international law that applies to armed conflicts. It does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter.

IHL is rooted in the rules of ancient civilizations and religions as warfare has always been subject to certain principles and customs. The massacre of civilians in the midst of armed conflict has a long and dark history. Selected earlier examples include: (i) massacres of the Kalingas by Ashoka in India; (ii) Crusader massacres of Jews and Muslims in the Siege of Jerusalem (1099 AD); and (iii) the massacre of some 100,000 Hindus by the Muslim troops of Tamerlane) as historical military practice before 1800 has been that in battle and in towns taken by force, combatants and non-combatants were killed and property was destroyed or looted.⁵²⁰

However, there have been frequent expressions and invocation of humanitarian norms for the protection of the victims of armed conflicts. In the Old

⁵¹⁹ https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf

⁵²⁰ Fritz Munch, History of the Laws of War, in: R. Bernhardt (ed.), *Encyclopaedia of Public International Law* Volume IV (2000), pp. 1386–8.

Testament, the King of Israel prevents the slaying of the captured, following the prophet Elisha's admonition to spare enemy prisoners: 'Now when the king of Israel saw them, he said to Elisha, 'My father, shall I kill them? Shall I kill them?' But he answered, 'You shall not kill them. Would you kill those whom you have taken captive with your sword and your bow? Set food and water before them, that they may eat and drink and go to their master.' ⁵²¹

Islamic law states that non-combatants who did not take part in fighting such as women, children, monks and hermits, the aged, blind, and insane were not to be molested. ⁵²² The first Muslim Caliph after Prophet Muhammad (PBUH), Abu Bakar, proclaimed, 'Do not mutilate. Do not kill little children or old men or women. Do not cut off the heads of palm trees or burn them. Do not cut down fruit trees. Do not slaughter livestock except for food.' ⁵²³ Islamic jurists have held that a prisoner should not be killed, as he 'cannot be held responsible for mere acts of belligerency.' ⁵²⁴

The most important antecedent of IHL is the current Armistice Agreement and Regularization of War, signed and ratified in 1820, between the authorities of the then Government of Great Colombia and the Chief of the Expeditionary Forces of the Spanish Crown, in the Venezuelan city of Santa Ana de Trujillo. The movement for ILS got impetus as Henry Dunant wrote a book, titled 'A Memory of Solferino,' in which he described the horrors he had witnessed. ⁵²⁵ It led to the founding of the ICRC in 1863, and the convening of a conference in Geneva in 1864, which drew up the Geneva Convention for the Amelioration of the Conditions of the Wounded in Armies in the Field.

Based on the principle of the humanity, the Geneva Conventions are the result of a process that developed in a number of stages between 1864, and 1949. It focused on the protection of civilians and those who can no longer fight in an armed conflict. As a result of World War II, all four conventions were revised,

⁵²¹ 2 Kings 6:21-23

⁵²² Khadduri, Majid (2006). War and Peace in the Law of Islam. New York, NY: Lawbook Exchange, pp. 103-4.

⁵²³ Hashmi, Sohail H. (2002). Islamic political ethics: civil society, pluralism, and conflict. Princeton, N.J: Princeton University Press, p. 211

⁵²⁴ McCoubrey, Hilaire (1999). International Humanitarian Law. Aldershot, UK: Ashgate Publishing, pp. 8-13

⁵²⁵ The Battle of Solferino on 24 June 1859 resulted in the victory of the allied French Army and Sardinian Army against the Austrian Army. The battle led the Swiss Jean-Henri Dunant to write his book, *A Memory of Solferino*. Although he did not witness the battle, he toured the field following the battle and was greatly moved by what he saw. Horrified by the suffering of wounded soldiers left on the battlefield, Dunant set about a process that led to the Geneva Conventions and the establishment of the International Red Cross.

based on previous revisions and on some of the 1907 Hague Conventions, and readopted by the international community in 1949. The first three Geneva Conventions were revised, expanded, and replaced, and the fourth one was added, in 1949.

- 1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was adopted in 1864. It was significantly revised in 1906, 1929, and later the First Geneva Convention of 1949;
- 2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea was adopted in 1906. It was significantly revised and replaced by the Second Geneva Convention of 1949;
- 3) Geneva Convention relative to the Treatment of Prisoners of War was approved in 1929, and significantly revised and replaced by the Third Geneva Convention of 1949; and
- 4) Geneva Convention relative to the Protection of Civilian Persons in Time of War was adopted in 1949.

There are three additional amendment protocols to the Geneva Convention:

- 1) https://en.wikipedia.org/wiki/Protocol_I Protocol I (1977): Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts.
- 2) Protocol II (1977): Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts.
- 3) Protocol III (2005): Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Adoption of an Additional Distinctive Emblem.

The Geneva Conventions of 1949, may be seen; therefore, as the result of a process which began in 1864, and have ‘achieved universal participation with 194 parties.’

2. Basic rules of IHL

The following fundamental rules permeate in all the Geneva Conventions:

- 1) Persons who are outside of combat (*hors de combat*), and those who are not taking part in hostilities in situation of armed conflict (e.g. neutral

- nationals), shall be protected in all circumstances;
- 2) The wounded and the sick shall be cared for and protected by the party to the conflict, which has them in its power. The emblem of the 'Red Cross,' or of the 'Red Crescent,' shall be required to be respected as the sign of protection;
 - 3) Captured persons must be protected against acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
 - 4) No one shall be subjected to torture, to cruel and degrading treatment.
 - 5) Parties to a conflict do not have an unlimited choice of methods and means of warfare.
 - 6) Parties to a conflict shall at all times distinguish between combatants and non-combatants. Attacks shall be directed solely against legitimate military targets.

The two streams of ILS that take their names from a number of international conferences which drew up treaties relating to war and conflict, in particular the Hague Conventions of 1899 and 1907, and the Geneva Conventions, the first which was drawn up in 1863. Both deal with *jus in Bello*, which deals with the question of whether certain practices are acceptable during armed conflict.

3. First Geneva Convention (1949)

The First Geneva Convention, for the Amelioration of the Condition of the Wounded in Armies in the Field, is one of four treaties of the Geneva Conventions. It defines 'the basis on which rest the rules of international law for the protection of the victims of armed conflicts.' It was first adopted in 1864, but was significantly updated in 1906, 1929, and 1949. The main provisions are as under:

- 1) The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the Parties, even if the state of war is not recognized by one of them and to all cases of partial or total occupation of the territory of Party.
- 2) In the case of armed conflict not of an international character, each Party to the conflict shall be bound to apply, as a minimum, the provisions to persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness,

wounds, detention, or any other cause, and they shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

- 3) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
- 4) Neutral Powers shall apply the provisions of the present Convention to the wounded and sick, and to members of the medical personnel and to chaplains of the armed forces of the Parties to the conflict, received or interned in their territory, as well as to dead persons found.
- 5) The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, undertake.
- 6) The Parties may at any time agree to entrust to an organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers.
- 7) Members of the armed forces and other persons who are wounded or sick, shall be respected and protected in all circumstances. They shall be treated humanely and cared for without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; they shall not willfully be left without medical assistance and care. Women shall be treated with all consideration due to their sex.
- 8) The present Convention shall apply to the wounded and sick belonging to the following categories: (i) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces; (ii) Members of other militias and members of other volunteer corps belonging to a Party to the conflict; (iii) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power; (iv) Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces; (v) Members of crews of the merchant marine and the crews of civil aircraft; (vi) Inhabitants of a non-occupied territory, who on the approach of the enemy, spontaneously take up arms to resist the invading forces.

- 9) The wounded and sick of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them.
- 10) At all times Parties to the conflict shall, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.
- 11) Parties to the conflict shall record, in respect of each wounded, sick or dead person, any particulars which may assist in his identification and information shall be forwarded to the Information Bureau established for this purpose under Geneva Convention. Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead, last wills or other documents of importance to the Next of Kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead.
- 12) Parties to the conflict shall ensure that burial or cremation of the dead is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made.
- 13) They shall further ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected and marked so that they may always be found.
- 14) The military authorities may appeal to the charity of the inhabitants voluntarily to collect and care for the wounded and sick. No one may ever be molested or convicted for having nursed the wounded or sick.
- 15) Fixed establishments and mobile medical units may in no circumstances be attacked, but shall at all times be respected and protected. Hospital ships shall not be attacked from the land. In time of peace and after the outbreak of hostilities, the Parties may establish hospital zones to protect the wounded and sick.
- 16) Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected.

- 17) The buildings, material, stores of fixed medical establishments, mobile medical units of the armed forces which fall into the hands of the enemy, shall be reserved for the care of wounded and sick.
- 18) Transports of wounded and sick or of medical equipment shall be respected and protected. Medical aircraft shall be respected.
- 19) The heraldic emblem of the Red Cross on a white ground is retained as the emblem and distinctive sign of the Medical Service of armed forces and the emblem shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.
- 20) Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.
- 21) The Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches of the present Convention.

4. Second Geneva Convention

Second Geneva Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea was adopted on 12th August 1949. Its main features are:

- 1) The Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the Parties, even if the state of war is not recognized by one of them and it shall also apply to all cases of partial or total occupation of the territory of a Party.
- 2) In the case of armed conflict not of an international character occurring in the territory of one of the Parties, the following acts are and shall remain prohibited at any time: (i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) taking of hostages; (iii) outrages upon personal dignity, in particular, humiliating and degrading treatment; and (iv) the passing of sentences without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees.
- 3) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties.
- 4) Members of the armed forces and other persons mentioned in the following Article, who are at sea and who are wounded, sick or shipwrecked shall be respected and protected. Such persons shall be treated humanely and cared for

without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.

- 5) The present Convention shall apply to the wounded, sick and shipwrecked at sea belonging to the following categories: (i) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces; (ii) Members of other militias and members of other volunteer corps, belonging to a Party to the conflict; (iii) Members of regular armed forces who profess allegiance to a Government; (iv) Persons who accompany the armed forces without actually being members thereof; (v) Members of crews; and (vi) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces.
- 6) All warships of a belligerent Party shall have the right to demand that the wounded, sick or shipwrecked on board military hospital ships, and hospital ships belonging to relief societies or to private individuals, as well as merchant vessels, yachts and other craft shall be surrendered.
- 7) The wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them.
- 8) Wounded, sick or shipwrecked persons, who are landed in neutral ports with the consent of the local authorities, shall be so guarded by the neutral Power, that the said persons cannot again take part in operations of war.
- 9) After each engagement, Parties shall, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.
- 10) The Parties shall record as soon as possible, in respect of each shipwrecked, wounded, sick or dead person, any particulars, which may assist in his identification, and such information shall be forwarded to the information bureau described under the Convention.
- 11) Parties shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead.
- 12) Parties shall ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, with a view to confirming death, establishing identity and enabling a report to be made.
- 13) If dead persons are landed, the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, shall be applicable.

- 14) The Parties may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead. Such vessels shall enjoy special protection and facilities to carry out such assistance.
- 15) Military hospital ships may in no circumstances be attacked or captured, but shall at all times be respected and protected.
- 16) Hospital ships utilized by National Red Cross Societies, officially recognized relief societies or by private persons of neutral states shall have the same protection as military hospital ships.
- 17) Should fighting occur on board a warship, the sickbays shall be respected and spared as far as possible.
- 18) Any hospital ship in a port, which falls into the hands of the enemy, shall be authorized to leave the said port.
- 19) Merchant vessels, which have been transformed into hospital ships, cannot be put to any other use throughout the duration of hostilities.
- 20) The religious, medical and hospital personnel of hospital ships and their crews shall be respected and protected. The religious, medical and hospital personnel assigned to the medical or spiritual care of the sick etc. be respected and protected.
- 21) Ships chartered shall be authorized to transport equipment exclusively intended for the treatment of wounded and sick members of armed forces or for the prevention of disease.
- 22) Medical aircraft, that is to say, aircraft exclusively employed for the removal of the wounded, sick and shipwrecked, and for the transport of medical personnel and equipment, shall be respected by the Parties. They shall be clearly marked with the distinctive emblem.
- 23) Medical aircraft of Parties may fly over the territory of neutral Powers, land thereon in case of necessity, or use it as a port of call after a prior notice, and obey every summons to alight, on land or water.
- 24) The emblem of the Red Cross on a white ground shall be displayed on the flags, armlets and on all equipment employed in the Medical Service.
- 25) Ships, Lifeboats of hospital ships, coastal lifeboats and small craft used by the Medical Service shall be painted as prescribed.
- 26) Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.

- 27) The Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs.
- 28) Each Party to the conflict, acting through its Commanders-in-Chief, shall ensure the detailed execution of the Convention.

5. Third Geneva Convention

Convention relating to the Treatment of Prisoners of War was adopted on 12th August 1949. Its main features are:

- 1) Prisoners of war are persons belonging to one of the following categories, who have fallen into the power of the enemy:
 - (a) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces;
 - (b) Members of other militias and members of other volunteer corps belonging to a Party and operating in or outside their own territory, even if this territory is occupied;
 - (c) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces;
 - (d) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties; and
 - (e) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces.
- 2) Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited. No prisoner of war may be subjected to physical mutilation or to medical or scientific experiments. Prisoners of war must at all times be protected, particularly against acts of violence or intimidation. Measures of reprisal against prisoners of war are prohibited. Women shall be treated with all the regard due to their sex.
- 3) The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.
- 4) Every prisoner of war is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number. Each Party to a conflict is required to furnish prisoners of war, with an identity card. No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information. Prisoners of war who refuse

to answer may not be threatened, insulted, or exposed to a disadvantageous treatment.

- 5) All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war. Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after an itemized receipt has been given.
- 6) Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone. The evacuation of prisoners of war shall always be effected humanely.
- 7) The Detaining Power may subject prisoners of war to internment. Prisoners of war may not be held in close confinement. Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness.
- 8) The Detaining Power shall assemble prisoners of war in camps or camp compounds according to their nationality, language and customs. Prisoners of war shall have shelters against air bombardment and other hazards of war.
- 9) Detaining Powers shall give the Powers concerned, all useful information regarding the geographical location of prisoner of war camps.
- 10) The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated, lighted and protected. Women and men shall be accommodated in separate dormitories.
- 11) The basic daily food rations shall be sufficient to keep prisoners of war in good health. Sufficient drinking water shall be supplied. Prisoners of war shall be associated with the preparation of their meals. Adequate premises shall be provided for messing. Clothing, underwear and footwear shall be supplied, which shall make allowance for the climate.
- 12) Canteens shall be installed in all camps, where prisoners of war may procure foodstuffs and ordinary articles in daily use at local market prices.
- 13) Prisoners of war shall have for their use, day and night, conveniences, which conform to the rules of hygiene.
- 14) Every camp shall have an adequate infirmary where prisoners of war may have the attention they require. Prisoners of war suffering from serious disease, or whose condition necessitates special treatment, must be admitted to any military or civilian medical unit.
- 15) Members of the medical personnel and chaplains while retained by the Detaining Power with a view to assisting prisoners of war shall not be considered as prisoners of war. They shall continue to exercise their medical and spiritual functions for the benefit of prisoners of war.

- 16) Prisoners of war shall enjoy complete latitude in the exercise of their religious duties. Adequate premises and Chaplains be provided. They shall be free to correspond on matters concerning their religious duties with the ecclesiastical authorities in the country of detention and with international religious organizations.
- 17) Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof.
- 18) Every prisoner of war camp shall be put under immediate authority of a responsible commissioned officer belonging to regular armed forces that shall be responsible for application of the Convention.
- 19) Upon the outbreak of hostilities, the Parties shall communicate to one another the titles and ranks of all the persons. Officers and prisoners of equivalent status shall be treated with the regard due to their rank and age.
- 20) The transfer of prisoners of war shall always be effected humanely and transfer shall in no case be prejudicial to their health.
- 21) The Detaining Power may utilize the labour of prisoners of war who are physically fit, taking into account their age, sex, rank and physical aptitude. Prisoners of war must be granted suitable working conditions.
- 22) Upon the outbreak of hostilities, the Detaining Power may determine the maximum amount of money in cash or in any similar form that prisoners may have in their possession. The Detaining Power shall grant all prisoners of war a monthly advance of pay. Prisoners of war shall be permitted to receive remittances of money addressed to them individually or collectively.
- 23) Prisoners of war shall be allowed to send and receive letters and cards. Prisoners of war, who have been without news for a long period, shall be permitted to send telegrams. Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing. All relief shipments for prisoners of war shall be exempt from dues.
- 24) The prisoners shall freely elect by secret ballot prisoners' representatives entrusted with representing them before the military or international authorities. Prisoners' representatives shall further the physical, spiritual and intellectual wellbeing of prisoners of war.
- 25) A prisoner of war shall be subject to the laws in force in the armed forces of the Detaining Power.
- 26) A prisoner of war who attempts to escape shall be liable only to a disciplinary punishment.
- 27) No prisoner of war may be tried or sentenced for an act, which is not forbidden by the law of the Detaining Power or by international law. No

prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel.

- 28) The detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked.
- 29) Upon the outbreak of a conflict and in all cases of occupation, each of the Parties shall institute an official Information Bureau for prisoners of war. The Information Bureau shall receive from the various departments concerned information regarding transfers, releases, repatriations, escapes, admissions to hospital, and deaths and then share such information to all relevant people.

6. Fourth Geneva Convention

The Fourth Geneva Convention normally called as The Geneva Convention relative to the Protection of Civilian Persons in Time of War, was adopted in August 1949. While the first three Conventions dealt with combatants, the Fourth Geneva Convention was the first to deal with humanitarian protections for civilians in a war zone. Its main features are:

- 1) Convention shall apply to all cases of declared war or of any other armed conflict, which may arise between two or more of the Parties. The Convention shall also apply to all cases of partial or total occupation of the territory of a Party. Although one of the Powers in conflict may not be a party to the Convention, the Powers who are parties thereto shall remain bound by it.
- 2) In the case of armed conflict not of an international character occurring in the territory of one of the Parties, each Party to the conflict shall be bound to apply, as a minimum, some provisions to Persons taking no active part in the hostilities.
- 3) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties may at any time agree to entrust to an international organization, which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention.
- 4) Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would be prejudicial to the security of such State.

- 5) The provisions cover the whole of the populations of the countries in conflict, without any adverse distinction and are intended to alleviate the sufferings caused by war.
- 6) The Parties after the outbreak of hostilities, may establish hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.
- 7) As far as military considerations allow, each Party shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill treatment.
- 8) The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.
- 9) Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected.
- 10) Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected. Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall be respected.
- 11) Each Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.
- 12) The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.
- 13) All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them.

- 14) Protected persons are entitled to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.
- 15) The Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands.
- 16) No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited. The taking of hostages is prohibited.
- 17) All protected persons who may desire to leave the territory shall be entitled to do so, unless their departure is contrary to the national interests of the State. Departures permitted shall be carried out in satisfactory conditions as regards safety, hygiene, sanitation and food.
- 18) Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.
- 19) Protected persons shall not be transferred to a Power, which is not a party to the Convention. In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.
- 20) The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.
- 21) The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.
- 22) The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account.

- 23) The Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory.
- 24) The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.
- 25) The Occupying Power shall in no way whatsoever divert relief consignments from the purpose for which they are intended, except in cases of urgent necessity, in the interests of the population of the occupied territory.
- 26) The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive. In case of a breach of the penal provisions, the Occupying Power may hand over the accused to its properly constituted, non-political military courts.
- 27) Protected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation.
- 28) Nationals of the occupying Power, who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities.
- 29) No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial. Accused persons shall have the right to present evidence necessary to their defence. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence. A convicted person shall have the right of appeal provided for by the laws applied by the court.
- 30) Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment. Wherever possible, interned members of the same family shall be housed in the same premises and given facilities for leading a proper family life.
- 31) Canteens shall be installed in every place of internment, except where other suitable facilities are available. Their purpose shall be to enable internees to make purchases, at prices not higher than local market prices, of articles of everyday use.
- 32) When taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear.

- 33) Every place of internment shall have an adequate infirmary, under the direction of a qualified doctor, where internees may have the attention they require. Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, must be admitted to any institution where adequate treatment can be given.
- 34) Internees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith. Ministers of religion who are interned shall be allowed to minister freely to the members of their community.
- 35) The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not.
- 36) Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment.
- 37) All internees shall receive regular allowances, sufficient to enable them to purchase goods and articles needed.
- 38) Every place of internment shall be put under the authority of a responsible officer, who shall be responsible for application of Convention.
- 39) The disciplinary regime in places of internment shall be consistent with humanitarian principles.
- 40) In every place of internment, the internees shall freely elect by secret ballot every six months, the members of a Committee empowered to represent them before the Detaining and the Protecting Powers, the International Committee of the Red Cross and any other organization, which may assist them. The Internee Committees shall further the physical, spiritual and intellectual wellbeing of the internees.
- 41) As soon as he is interned, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be enabled to send internment card direct to his family, on the one hand, and to the Central Agency provided under this Convention. Internees shall be allowed to send and receive letters, telegrams, parcels or collective shipments containing foodstuffs, clothing, medical supplies, as well as books and objects of a devotional, educational or recreational character.
- 42) Detaining Power shall afford internees all facilities to enable them to manage their property.
- 43) The laws in force in the territory in which they are detained will continue to apply to internees who commit offences during internment.

- 44) Internees, who are recaptured after having escaped or when attempting to escape, shall be liable only to disciplinary punishment in respect of this act.
- 45) The transfer of internees shall always be effected humanely.
- 46) The wills of internees shall be received for safekeeping by the responsible authorities; and in the event of the death of an internee his will shall be transmitted without delay to a person whom he has previously designated. A doctor shall certify deaths of internees in every case, and a death certificate shall be made out, showing the causes of death and a duly certified copy of such record shall be transmitted without delay to the Protecting Power as well as to the Central Agency under this Convention.
- 47) The Detaining Authorities shall ensure that internees who die while interned are honourably buried, if possible according to the rites of the religion to which they belonged and that their graves are respected, properly maintained, and marked to be recognized.
- 48) The representatives of religious organizations, relief societies, or any other organizations assisting the protected persons, shall receive, all facilities for visiting the protected persons, for distributing relief supplies and material from any source, intended for educational, recreational or religious purposes, or for assisting them in organizing their leisure time within the places of internment.
- 49) Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons. Each national Bureau shall immediately forward all information to all concerned.
- 50) The Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.

Chapter Twenty-Two

INTERNATIONAL LABOUR STANDARDS

1. Introduction

The World Commission on the Social Dimension of Globalization says that ‘the rules of the global economy should be aimed at improving the rights, livelihoods, security, and opportunities of people, families and communities around the world.’⁵²⁶ For this lofty objective, the International Labour Organization has developed a system of International Labour Standards that aim at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity.

Globalization has created great opportunities and benefits for many, yet at the same time hundreds of millions of workers and employers have had to face new economic and social challenges. Because of the globalized economy workers and enterprises have shifted to new locations. It has also resulted in the sudden accumulation or flight of capital, and cause financial instability in certain regions. Nearly 1/2 of the world’s population — more than 3 billion people — lives on less than \$2.50 a day. More than 1.3 billion live in extreme poverty — less than \$1.25 a day.⁵²⁷ 80% of the world population lives on less than \$10 a day.⁵²⁸ Even in 20 industrialized countries, over 10% of the population on average was living below the poverty line in the mid-1990s.

Similarly, inequality with many countries and between the world’s richest and poorest nations has also grown exponentially over the last few decades. In 1960, the income gap between the wealthiest and the poorest fifth of the world’s population was 30 to 1. By 1999, it had increased to 74 to 1, in

⁵²⁶ ILO: *A Fair Globalization: Creating opportunities for all*, Report of the World Commission on the Social Dimension of Globalization (Geneva, 2004), p. 143.

⁵²⁷ United Nations Development Programme. ‘Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience’. Human Development Report, 2014.

⁵²⁸ Ravallion, Martin, Shaohua Chen, and Prem Sangraula. Dollar a Day Revisited. Working paper no. 4620. The World Bank, May 2008.

1995, average GDP per capita in the richest 20 countries was 37 times the average in the poorest 20 – a gap that doubled in 40 years.⁵²⁹

The concept of protecting workers from the perils of labour environments dates all the way back to 14th-century Europe. The first example of the modern labour rights movement, though, came in response to the brutal working conditions that accompanied the onset of the Industrial Revolution in the 18th and 19th centuries.⁵³⁰ In 1802, the Parliament of the United Kingdom passed what is now known as the English Factories Act that sought to regulate the workday of apprentices by restricting work hours to 12 per day. In doing so, the English Factory Act served as a precursor to the models of international labour standards seen today. Minimal regulations similar to those found in English legislation subsequently became increasingly commonplace among 19th century industrialising nations. Early attempts at the provision of labour standards were limited in scope, though.

In 1919, the International Labour Organization (ILO) was created in recognition of the fact that ‘conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled.’ To tackle this problem, the ILO established System of International Labour standards (ILS) – international conventions and recommendations drawn up by representatives of government, employer and workers from around the world – covering all matters related to workplace.

2. What are ILS?

The ILSs are legal instruments drawn up by the ILO’s constituents (governments, employers and workers) and these set out basic principles and rights at work. They are either Conventions, (legally binding international treaties), or Recommendations, which serve as non-binding guidelines. Recommendations may be independent of any Convention.

⁵²⁹ W. Sengenberger: *Globalization and Social Progress: the role and impact of international labour standards* (Bonn, Friedrich-Ebert-Stiftung, 2002), p. 20

⁵³⁰ Brown, Drusilla K. "Labour standards: Where do they belong on the international trade agenda?" *The Journal of Economic Perspectives* 15, no. 3 (2001): 89-112

The Conventions and Recommendations are drawn up by representatives of government, employers and workers and are adopted at the ILO's annual International Labour Conference. Once a standard is adopted, member states are asked to submit them to their competent authority (normally the Parliament or Cabinet) for consideration. In the case of Conventions, this means consideration for ratification. If a Convention is ratified, it generally comes into force for the country one year after the date of ratification. Ratifying countries are bound to applying the Convention in national law and practice and reporting on its application at regular intervals to ILO. Representation and complaint procedures can be initiated against countries for violations of a convention they have ratified.

3. Benefits of ILS

The benefits of the ILS include:

- 1) **A path to decent work:** ILS are first and foremost about the development of people as human beings. The Declaration of Philadelphia of 1944, recognized that 'labour is not a commodity.' Work is part of everyone's daily life and is crucial to a person's life, dignity, well-being and development as a human being. Therefore, work shall be in freedom, safety and dignity and ILS are there to ensure that it remains focused on improving human life and dignity;
- 2) **Framework for fair and stable globalization:** having opportunity of decent work in the globalized economy requires action at the international level. The ILO contributes to this legal framework by elaborating and promoting international labour standards aimed at making sure that economic growth and development go along with the creation of decent work;
- 3) **A level playing field:** ILS ensure a level playing field in the global economy. It helps governments and employers to avoid the temptation of lowering labour standards in the belief that this could give them a greater comparative advantage in international trade;
- 4) **A means of improving economic performance:** growing research indicates that compliance with ILS often accompanies improvements in

productivity and economic performance as higher wages and better working conditions/standards and respect for equality translate into better and more satisfied workers and lower turnover of staff. Investment in vocational training results in a better-trained workforce and higher employment levels. Safety standards can reduce costly accidents and health care costs;

- 5) **A safety net in times of economic crisis:** any economy can experience unforeseen economic downturns e.g. Asian financial crisis of 1997. An ILO study concludes that strengthening social dialogue, freedom of association, and social protection systems in the region would provide better safeguards against such economic downturns,⁵³¹
- 6) **A strategy for reducing poverty:** an economy governed by a fair set of rules and institutions is more efficient and brings benefit to everyone. Fair labour practices set out in ILS and applied through a national legal system ensure an efficient and stable labour market for workers and employers alike. The freedom of association, social protection, occupational safety and health, vocational training, and other measures required by ILS have proved to be effective strategies in reducing poverty and bringing workers into the formal economy; and
- 7) **The sum of international experience:** ILS represent the international consensus on how a particular labour problem could be tackled at the global level and reflect knowledge and experience from all corners of the world and all can benefit from this knowledge by incorporating the standards in their domestic framework.

4. Fundamental Conventions

The ILO has identified the following eight Conventions as ‘Fundamental’ Conventions:

- 1) **Freedom of Association and Protection of the Right to Organise Convention, 1948 (C 87)**

⁵³¹ E. Lee: the Asian Financial Crisis: the challenge for social policy (Geneva, ILO, 1998)

The fundamental principles underlying this Convention and the rights guaranteed include:

- a. 'Recognition of the principle of freedom of association,' to be a means of improving conditions of labour and of establishing peace;
- b. 'Freedom of expression and of association are essential to sustained progress';
- c. Workers and employers, without distinction whatsoever, shall have the right to establish and subject only to the rules of the organizations concerned, to join organisations of their own choosing without previous authorization.
- d. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes,
- e. The public authorities shall refrain from any interference, which would restrict this right or impede the lawful exercise of these rights.
- f. Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.
- g. Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organization, federation or confederation shall have the right to affiliate with international organisations of workers and employers.
- h. Workers and employers and their respective organisations shall respect the law of the land.
- i. The law of the land shall not impair the guarantees provided for in this Convention.
- j. National laws or regulations shall determine the matters of the armed forces and the police.

- k. Each Member shall take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.

2) Convention Concerning the Application of the Principles of the Right to organize and to Bargain Collectively (C 98)

The fundamental principles underlying this Convention and the rights guaranteed include:

- a. Workers shall enjoy adequate protection against acts denoting discrimination against workers' right to organize.
- b. Such protection shall apply more particularly in respect of acts calculated to:
 - i. Make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - ii. Cause the dismissal of or otherwise a worker against on account of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.
- c. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
- d. Acts, designed to promote the establishment of workers 'organisations under the domination of employers or employers' organisations, are prohibited.
- e. Machinery, appropriate to national conditions, shall be established where necessary for the purpose of ensuring respect for the right to organize.
- f. Measures appropriate to national conditions shall be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers and workers' organisations,

with a view to the regulation of terms and conditions of employment by means of collective agreements.

- g. National laws or regulations shall determine the matters of the armed forces, public servants and the police.

3) Convention concerning Forced or Compulsory Labour (C 29)

The fundamental principles underlying this Convention and the rights guaranteed include:

- a. The term forced or compulsory labour shall mean all work or service, which is exacted, from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. The term forced or compulsory labour shall not include:
 - I. Any work or service exacted by virtue of compulsory military service laws for work of a purely military character;
 - II. Any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
 - III. Any work or service exacted from any person as a consequence of a conviction in a court of law provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individual companies or associations;
 - IV. Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or a threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
 - V. Minor communal services of a kind which, being performed by the members of the Community in the direct interest of the said community.

- b. Each Member undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.
- c. Recourse to forced or compulsory labour may be had, during the transitional period of five years, for public purpose only and as an exceptional measure, subject to the conditions and guarantees hereinafter provided.
- d. The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.
- e. Where concessions exist containing provisions involving such forced or compulsory labour, such provisions shall be rescinded as soon as possible.
- f. The responsibility for every decision to have recourse to forced or compulsory labour shall rest with the highest civil authority in the territory concerned.
- g. Any authority competent to exact forced or compulsory labour shall, before deciding to have recourse to such labour, satisfy itself- (a) that the work to be done or the service to be rendered is of important direct interest for the community called upon to do work or render the service; (b) that the work or service is of present or imminent necessity; (c) that it has been impossible to obtain voluntary labour for carrying out the work or rendering the service by the offer of rates or wages and conditions of labour not less favourable than those prevailing in the area concerned for similar work or service; and (d) that the work or service will not lay too heavy a burden upon the present population, having regard to the labour available and its capacity to undertake the work;
- h. Forced or compulsory labour exacted as a tax and forced or compulsory labour to which recourse is had for the execution of public works by chiefs who exercise administrative functions shall be progressively abolished.

- i. Only adult, able-bodied males, who are of an apparent age of not less than 18 and not more than 45 years, may be called upon for forced or compulsory labour.
- j. The maximum period for which any person may be taken for forced or compulsory labour of all kinds in any one period of twelve months shall not exceed sixty days, including the time spent in going to and from the place of work.
- k. The normal working hours of any person from whom forced or compulsory labour is exacted shall be the same as those prevailing in the case of voluntary labour, and the hours worked in excess of the normal working hours shall be remunerated at the rates prevailing in the case of overtime for voluntary labour.
- l. A weekly day of rest shall be granted to all persons from whom forced or compulsory labour of any kind is exacted.
- m. Any laws or regulations relating to workmen's compensation for accidents or sickness and any laws or regulations providing compensation for the dependents of deceased or incapacitated workers shall be equally applicable to persons from whom forced or compulsory labour is exacted and to voluntary workers.
- n. The persons from whom forced or compulsory labour is exacted shall not be transferred to districts where the food and climate differ so considerably from those to which they have been accustomed as to endanger their health.
- o. Before permitting recourse to forced or compulsory labour for works of construction or maintenance which entail the workers remaining at the workplaces for considerable periods, the competent authority shall satisfy itself that (i) all necessary measures are taken to safeguard the health of the workers; (ii) definite arrangements are made to ensure the subsistence of the families of the workers including facilitating the remittances.

- p. Forced or compulsory labour shall not be used for work underground in mines.

4) Abolition of Forced Labour Conventions, 1957 (C 105)

The fundamental principles underlying this Convention and the rights guaranteed include:

- a. Each member undertakes to suppress and not to make use of any form of forced or compulsory labour:
 - i. As a means of political coercion or education or as a punishment for holding or expressing political views or ideologically opposed to the established political, social or economic system;
 - ii. As a method of mobilising and using labour for purposes of economic development;
 - iii. As a means of labour discipline;
 - iv. As a punishment for having participated in strikes; and
 - v. As a means of racial, social, national or religious discrimination;
- b. Each Member undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour.

5) Convention concerning Minimum Age for Admission to Employment, 1973 (C 138)

The fundamental rights in the Convention are:

- a. Each Member undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with fullest physical and mental development of young persons.
- b. Each Member shall specify a minimum age for admission to employment or work within its territory.

- c. The minimum age shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.
- d. A Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and worker concerned initially specify a minimum age of 14 years.
- e. The minimum age for admission to any type of employment or work, which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or moral of young persons shall not be less than 18 years.
- f. National laws or regulations may, after consultation with the organisations of employers and workers concerned, authorize employment or work as from the age of 16 years on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training.
- g. In so far as necessary, the competent authority, after consultation with the organization of employers and workers concerned, may exclude from the application of this Convention limited categories of employment or work in respect of which special and substantial problems of application arise.
- h. Such member shall list in its first report on the application of the Convention submitted to ILO any categories which may have been excluded, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice in respect of the categories excluded and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.
- i. A member whose economy and administrative facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, initially limit the scope of application of this Convention.

- j. The provisions of the Convention shall be applicable as a minimum to the following: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; plantations and other agricultural undertakings mainly producing for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.
- k. This Convention does not apply to work done by children and young persons in schools for general, vocational or technical education or in other training institutions, or to work done by persons at least 14 years of age in undertakings, where such work is carried out in accordance with conditions prescribed by the competent authority, after consultation with the organisations of employers and workers concerned, where such exist, and is an integral part of:
 - I. A course of education or training for which a school or training institution is primarily responsible;
 - II. A programme of training mainly or entirely in and undertaking, which programme has been approved by the competent authority; or
 - III. A programme of guidance of orientation designed to facilitate the choice of an occupation or of a line of training.
- l. National laws or regulations may permit the employment or work of persons 13 to 15 years of age on light work which is:
 - a) Not likely to be harmful to their health or development; and
 - b) Not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes.
- m. After consultation with the organisations of employers and workers concerned, the competent authority may, by conditional permits granted in individual cases, allow exception to the prohibition of employment or work for such purposes as participation in artistic performances.

- n. All necessary measures, including the provision of appropriate penalties, shall be taken by the competent authority to ensure the effective enforcement of the provisions of this Convention.
- o. National laws or regulations or the competent authority shall define the persons responsible for compliance with the provisions giving effect to the Convention.
- p. National laws or regulations or the competent authority shall prescribe the registers or other documents which shall be kept and made available by the employer; such registers or documents shall contain the names and ages or dates of birth, duly certified wherever possible, of persons whom he employs or who work for him and who are less than 18 years of age.

6) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (C 182)

The fundamental principles and rights in the Convention are:

- 5) There is a need to adopt new instruments for the prohibition and elimination of the worst forms of child labour. The term child shall apply to all persons under the age 18.
- 6) The effective elimination of the worst forms of child labour requires immediate and comprehensive action.
- 7) Child labour, to a great extent, is caused by poverty and that the long-term solution lies in sustained economic growth leading to social progress, in particularly poverty alleviation and universal education.
- 8) For the purposes of this Convention, the term the worst forms of child labour comprises:
 - i. All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

- ii. The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
 - iii. The use, procuring or offering of a child for illicit activities in particular for the production and trafficking of drugs as defined in the relevant international treaties;
 - iv. Work, which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children. Such work shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards.
- 9) The competent authority, after consultation with the organizations of employers and workers concerned, shall identify where the types of work so determined exist and the list of the types of work so determined shall be periodically examined and revised as necessary.
- 10) Each Member shall, after consultation with employers' and workers' organizations, establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to this Convention.
- 11) Each Member shall take immediate and effective measures, including penal sanctions, to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.
- 12) Each Member shall design and implement programs of action to eliminate as a priority the worst forms of child labour.
- 13) Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the prohibition.
- 14) Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:
- i. Prevent the engagement of children in the worst forms of child labour;

- ii. Provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;
- iii. Ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;
- iv. Identify and reach to children at special risk; and
- v. Take account of the special situation of girls.

7) Equal Remuneration Convention, 1951 (C 100)

The fundamental principles and rights in the Convention are:

- a. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.
- b. The term 'remuneration' includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;
- c. The term 'equal remuneration for men and women workers for work of equal value'; refers to rates of remuneration established without discrimination based on sex.
- d. These principle may be applied by means of:
 - i. National laws or regulations;
 - ii. Legally established or recognized machinery for wage determination;
 - iii. Collective agreements between employers and workers; or
 - iv. Combination of these various means.

- e. Measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration and by collective agreements.
- f. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

8) Discrimination (Employment and Occupation) Convention, 1958 (C 111)

The fundamental principles and rights in the Convention are:

- a. All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;
- b. Discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights;
- c. The term discrimination includes:
 - i. Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
 - ii. Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations;
- d. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

- e. The terms 'employment and occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.
- f. Each Member undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating discrimination.
- g. Each Member undertakes, by methods appropriate to national conditions and practice, to:
 - i. Seek the co-operation of employers' and workers' organisations in promoting the acceptance and observance of this policy;
 - ii. Enact such legislation and to promote such educational programs as may be calculated to secure the acceptance and observance of the policy;
 - iii. Repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
 - iv. Pursue the policy in respect of employment under the direct control of a national authority;
 - v. Ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
 - vi. Indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action;
 - vii. Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to

appeal to a competent body established in accordance with national practice;

- viii. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination; and
- ix. Any Member may, after consultation with representative employers' and workers' organisations, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.

5. Governance Conventions

The ILO's Governing Body has also designated another four Conventions as 'priority' instruments, thereby encouraging member states to ratify them because of their importance for the functioning of the ILS. The four Governance Conventions are:

- 1) Labour Inspection Convention 1947 (C 81)
- 2) _Employment Policy Convention 1964 (C122)
- 3) Labour Inspection (Agriculture) Convention 1969 (C129)
- 4) _Tripartite Consultation (International Standards) Convention (C144) ⁵³²

⁵³² <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

Chapter Twenty-Three

BONDED LABOUR AND SLAVERY

1. Introduction

Although the world is no longer blighted by the forms of slavery, which were practiced openly in many countries during the nineteenth and even early twentieth century, slavery nevertheless continues to be reported in a wide range of forms. However, national laws ban slavery and the prohibition is enshrined in international treaties, notably the 1948 Universal Declaration of Human Rights. Article 4 of which guarantees that ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’ Yet slavery still occurs and humiliation associated with slavery has not disappeared. Contemporary slaves still work in the rural fields as well as in the urban industries.

The debates, which preceded the adoption of the two main international Conventions against slavery, the first in 1926, and the second in 1956, provide ample information about the existing forms of servitude, which the international community wished to prohibit. Many states tend to assume now that there is no need for antislavery laws. In practice, there is a pressing need for laws and action to ensure that new forms of exploitation and oppression do not take the form of slavery.

2. Definitions

A question arises, what is slavery? When it was adopted as an international treaty prohibiting slavery almost 60 years ago the League of Nations, gave the following definition of slavery: ‘Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.’⁵³³

This definition of slavery makes clear that the international community was also determined to abolish a wide range of other practices which

⁵³³ Article 1(1) of International Slavery Convention, 1926

involved partial ‘powers’ of ownership and were considered to be ‘analogous to slavery’ even though they had not previously been defined as slavery. These included debt bondage, false adoption (of children to work as domestic servants), servitude imposed by serfdom, and domestic slavery. Some of these were the subject of explicit prohibition by the United Nations 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery.

The four ‘institutions and practices similar to slavery’ which were banned by the 1956 Supplementary Convention, which still persists and affect millions of victims, are: debt bondage, serfdom, servile marriage, and child labour. Finally, three other forms of servitude are described which exhibit many of the characteristics of slavery: (i) servile domestic work; (ii) forced labour; and (iii) servitude for ritual or religious purposes. Governments are under an obligation to take urgent remedial action to prevent these if they amount to slavery-like practices, as is often the case.

3. Traditional ‘Chattel’ Slavery

Countries experiencing resurgence in slavery are mostly those affected by armed conflict somewhere in their territory. In the areas of conflict, the militias are able to force people to work for them unpaid to perform forced labour without fear of retribution. However, there have also been recent reports of Government soldiers forcing civilians to work as slaves, outside any legal framework.

There are several countries in which slavery has been formally abolished relatively recently but due to ineffective governmental measures, the former slaves and their families are still obliged to provide services to a former owner or owner’s family. Evidently in such cases, it is important that the state concerned should be reporting on a regular basis to the international community about the progress made towards the complete eradication of all slavery-like practices. However, neither the Conventions require States Parties to report on measures taken against slavery, nor have they established any form of permanent treaty-monitoring committees.⁵³⁴ As a result, it is only if governments or non-government organizations choose to present

⁵³⁴ In contrast to recently adopted UN Human Rights Instruments

information to the annual meeting of the United Nations Working Group on Contemporary Forms of Slavery, which was established in 1974, and reports to the Sub-Commission on Prevention of Discrimination and protection of Minorities (and indirectly to the United Nations Council on Human Rights) that the international community becomes aware of persisting patterns of slavery or slavery-like practices.

4. Bonded Labour

Mr. Justice Bhagwati, the former Chief Justice of India has graphically depicted bonded labour in the following terms: ‘Bonded labourers’ are non-beings, exiles of civilization, living a life worse than that of animals, for the animals are at least free to roam about as they like...this system, under which one person can be bonded to provide labour for another for years and years until an alleged debt is supposed to be wiped out, which never seems to happen during the lifetime of the bonded labourer, is totally incompatible with the new egalitarian socio-economic order which we have promised to build.’⁵³⁵

The Article 1 of 1956 Supplementary Convention does not prohibit people from taking loans in money or in kind and then repaying their debt by working for the person who has given the loan. However, it does forbid any cases of ‘debt bondage’ in which the precise terms of the repayment have not been specified⁵³⁶ or in which work done by the debtor is not rewarded at least at the same rate paid for other similar work.

In cases of chronic bondage, debts are inherited from one generation to the next, maintaining members of a family in permanent bondage in return for an old loan, the details of which have long been forgotten. In some cases, employers who are owed money ‘sell’ the debt to a new employer; the difference between such transactions and the slave trade is one of semantics rather than substance.

⁵³⁵ www.the-south-asian.com/Nov2002/Bonded_labour.htm: Justice PN Bhagwati, Indian Supreme Court, 1982

⁵³⁶ So the person making loan can potentially add unspecified interest or other costs to the loan

Nowadays there are also many cases of shorter-term bondage. For example migrant workers who agree to travel to another province or country in order to work, may then discover that they are obliged to work unpaid because their wages must be used to repay the costs of their travel, accommodation and meals. Loans are accepted by people who work not only on farms but in a wide variety of low status manual jobs, for example in stone quarries, at brick or charcoal kilns, at looms making carpets or cloth, preparing fish or other sea-food for freezing, and making a variety of articles out of glass.

In many cases, entire families have to work⁵³⁷ to pay off debt. In other cases, parents 'pawn' their own children, sometimes from the age of as little as four or five in return for loans which they never repay; the child consequently remains a bonded labourer for the rest of his or her childhood.

5. Serfdom

Article 1 of the Supplementary Convention also prohibits 'Serfdom' that is to say the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is to free to change his status.

It is not just debt, which ties farmers to a landlord. In many countries, individuals, families or entire social groups have traditionally been obliged to work for others for little or no reward. Although this status usually has no basis in law, the practices nevertheless persist and are frequently enforced with violence at local level. For example many agricultural workers are not able to get access to work or to land on which to produce food for their families unless they agree to work on a permanent basis for richer landlords, either on their farms or in the homes. They have to accept a form of serf or servile status.

Elsewhere, the same sort of servile status, although formally abolished in law, receives legitimacy through local religious beliefs. This is particularly the case in countries with caste systems where at village level particular

⁵³⁷ For example in stone quarries or at brick kilns

families are obliged both by tradition and sometimes by violent coercion to work unpaid as sweepers, cleaners or in various forms of agricultural work. In extreme cases, the services, which workers must provide, include domestic works both during the day and at night, and on some occasions the sexual services of women workers or the wives of male workers.

The Governments of countries in which such practices persist are obliged by the Supplementary Convention to take action to end them, not just in law (for example, by declaring caste or serf status to be abolished), but also in practice.

6. Servile Marriage

The Supplementary Convention prohibits:

Any institution or practice whereby:

- (i) A woman, without the right to refuse is promised or given in marriage on payment of a consideration in money to her parents, guardian, family or any other person or group; or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
- (iii) A woman on the death of her husband is liable to be inherited by another person.⁵³⁸

This prohibition affects a wide range of practices, which continue to be reported in the 1990s. Taken together with other international agreements, this Convention imposes significant obligations on governments to make changes in both the law and practices in their countries not only those directly concerning marriage, but also others which have an indirect effect.

A typical case in which this Article of the Supplementary Convention is violated occurs when a 12 years old girl is told that her family has arranged her marriage to a 60-years man. Ostensibly, she has right to refuse, but in practice she has no opportunity to exercise that right and is unaware that she can do so. The marriage is considered to constitute 'servile marriage' and to

⁵³⁸ Article 1 of supplementary Convention

be a form of slavery if a payment of any kind is made for the girl that exceeds the amount of gifts or money customarily exchanged at the time of marriage in the country or culture concerned.

In many cultures, it is traditional for money or goods to exchange hands at the time of marriage. In some cases, it is the husband or his family that pays bride-wealth to the bride's family. This practice can evidently deteriorate into a form of 'purchase' for the bride and her services, and as such is prohibited by the Supplementary Convention. In other cultures, it is the bride's family that must provide money or goods to the husband or his family and their failure to provide large enough amounts sometimes provokes acts of violence against the newly married wife.

In order to reduce the opportunities for servile marriage of this sort to occur, the Article 2 of the Supplementary Convention also imposes an obligation on States Parties to take other positive action: 'with a view to bringing to an end the institutions and practices mentioned in Article 1 (c) of this Convention, the States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to marriage may be freely expressed in the presence of a competent civil or religious authority and to encourage the registration of marriage may be freely expressed in the presence of a competent civil or religious authority and to encourage the registration of marriages.'⁵³⁹

In practice, many states, which have acceded to the Supplementary Convention, have not yet implemented Article 2. Subsequent international instruments have reinforced the obligation that states should make the registration of marriage compulsory. For example, the Convention on the Elimination of All forms of Discrimination Against Women, adopted by the UN General Assembly in 1979, stipulates that: 'The betrothal and the marriage of a child shall have no legal effect, and all necessary action including legislation, shall be taken to specify a minimum age for marriage

⁵³⁹ Article 2 of supplementary Convention on the Abolition of Slavery

and to make the registration of marriages in an official registry compulsory.’⁵⁴⁰

The final part of Article 1 of the supplementary Convention dealing with servile marriage becomes relevant when, just a few years after her marriage, the same young girl’s older husband dies. In numerous countries, the young widow is ‘inherited’ by a male member of her husband’s family, often a surviving brother. This practice is known as the ‘levirate.’⁵⁴¹ She is remarried whether or not she desires the new marriage and whether or not her new husband already has an existing wife. This form of inheritance is sometimes justified by those who practice it on the grounds that it ensures the widow is looked after and does not become destitute. However, she would only fall into destitution if she is already the victim of a servile marriage in which she is denied the right to property of her own or the opportunity to develop her own sources of livelihood.

The practice of ‘the levirate’ is clearly condemned by the Supplementary Convention and the governments of states, which have ratified the Convention, are under an obligation to eliminate it. The Supplementary Convention is also quite categorical in banning any sale or transfer of a married woman by her husband or his family to a new husband in exchange for money or other goods.⁵⁴²

7. Child Labour

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery prohibits: ‘any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian

⁵⁴⁰ 2.Article 16(2) of CEDAW

⁵⁴¹ Levirate, custom or law decreeing that a widow should, or in rare cases must, marry her dead husband’s brother. The term comes from the Latin *levir*, meaning ‘husband’s brother’. The ‘brother’ may be a biological sibling of the deceased or a person who is socially classified as such. Where the brother is required to be younger than the deceased, the custom is called the junior levirate. The levirate often co-occurs with the sororate a practice in which a widower should or must marry his dead wife’s sister: <https://www.britannica.com/topic/levirate>

⁵⁴² Article 1(c) of the Supplementary Convention on the Abolition of Slavery

to another person, whether for reward or not, with a view to the exploitation of the child or young person of his labour.’⁵⁴³

This is not a prohibition of all child labour as the emphasis is on preventing parents from passing their child on to another person (whether or not any money is exchanged) who effectively gains control of the child and the child’s labour. The prohibition in the Supplementary Convention was designed among other things to prevent children from being exploited as domestic workers, either through the practice of ‘sham adoption’ (i.e. being nominally welcomed into a new household as a member of the family, when the real motive is to require the new member to work as an unpaid domestic servant).

Children’s labour is also exploited in other ways that contravene the Supplementary Convention, as well as other international human rights standards such as the United Nations’ Convention on the Rights of the Child (CRC) (1989). The CRC contains clear principles to protect children from the exploitation of their labour. While children may work, the Convention stipulates that their jobs should not be ‘hazardous’ and should not ‘interfere with [their] education’ or ‘harmful to the child’s health or physical, mental, spiritual, moral or social development.’ The priority due to primary education means that children below the age of 12 should not have jobs. Child labourers are routinely prevented from attending school, despite being of primary school age, and, in the case of child domestic workers, although there may be other children attending school in the household where they work.

In all cases, child labourers are dangerously vulnerable to physical abuse,⁵⁴⁴ excessively long hours or being made to work in dangerous or cramped conditions. Girl domestic workers, in particular, are vulnerable to sexual abuse. Although many countries have laws regulating the hours or conditions for child labourers, employers often avoid visit by labour inspectors by claiming that children are working in ‘cottage industries’ or ‘family units’.

⁵⁴³ Article 1(d) of the Supplementary Convention

⁵⁴⁴ Both beatings and sexual abuse

Debt bondage, described above, affects many children as well as adults. Parents ‘pawn’ their own children, sometimes from the age of as little as four or five years, in return for loan, which they never repay. Often they are pawned to employers who stress the need for what they call the ‘nimble fingers’ of children to undertake particular forms of work, when in fact they are seeking a docile labour, which can be coerced into obeying orders and is unable to defend it or organize any collective action in its own defense. For example a 10 year-old boy works 14 hours a day at a loom. At night he sleeps under the loom as his parents live hundreds of kilometres away. They sent him away to work in exchange for a loan, which will in theory be repaid out of his wages.

8. Slavery like practices

1) Migrant Labour

Throughout the world domestic workers are generally afforded inadequate protection by the law as far as minimum wages or conditions are concerned, and some categories of domestic workers are subjected to slavery, particularly children and immigrants who work and live in the same house as their employer and are paid little or nothing for their work. Both are particularly vulnerable, being cut off both from their own families and from local society and the possible protection which social contacts or local institutions might provide. Cases of enslaved domestic workers continue to be reported in developed countries – where servants are brought in from other countries, either legally or illegally, and then treated like slaves.

In many cases, domestic workers receive low wages or no wages at all, on the grounds that they receive food and lodging, but there is no attempt to ensure that this payment ‘in kind’ is worth as much as the monetary wages which workers would be paid for similar long hours in any other comparable sector. Their living conditions, as well as conditions of work, are often extremely harsh, but are virtually never inspected by any independent authority.

Before both the Conventions against slavery were adopted, there were discussions about whether the definition of slavery should explicitly prohibit

domestic slavery or define the circumstances in which domestic work amounted to slavery. The conclusion, however, was that the general definition of slavery adopted in the 1926 Slavery Convention (any or all of the powers attaching to the right of ownership) covered domestic workers along with all others.

2) Forced labour

‘Forced labour’ is not an alternative term for slavery, although confusion is sometimes created by implying that slavery is simply a category of forced labour. International Labour Standards adopted soon after the 1926 Slavery Convention prohibited the use of forced labour other than by the state, but recognized that the state was entitled to oblige people to undertake work of certain types in some particular circumstances. Although the circumstances in which individual citizens can be obliged to perform forced labour are now clearly circumscribed, International Labour Standards recognize that states may make convicted prisoners perform forced labour and also allow states to require some or all of their citizens to perform compulsory military service.

In reality, political authorities, both government forces and other political movements, which exercise powers of coercion, are able to force individuals to work without payment, often in harsh or dangerous condition. Such cases have been reported recently mainly in countries affected by war or civil conflict, where forced labour is reported both in areas of fighting and elsewhere, with the typical image of a column of civilian porters carrying heavy loads of military equipment towards the battle-front, surrounded by armed men in uniform who threaten to shoot anyone who drops their load. Those enslaved in this way are often the weak or defenceless—refugees, members of ethnic groups and in the worst cases, they have been used as ‘human mine detectors’ or arbitrarily killed by soldiers after working for them.

International Labour Standards very strictly limit the use of Forced Labour and urge its total elimination. The Forced Labour Convention 1930 (No. 29) defines the term ‘forced or compulsory labour’ as ‘all work or service, which is exacted from any person under the menace of any penalty

and for which the said person has not offered himself voluntarily.’ Nevertheless, the term ‘forced or compulsory labour’ shall not include:

- a. Any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
- b. Any work service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- c. Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals companies or associations;
- d. Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic disease, invasion by animals, insect or vegetable pests, and in general any circumstances that would endanger the existence or the well-being of the whole or part of the population;
- e. Minor communal services of a kind, which, being performed by the members of the community in the direct interest of the said community can, therefore, be considered as normal civil obligations incumbent upon the members of the community.⁵⁴⁵

The Convention obligates the States Parties to suppress the use of forced or compulsory labour in all its forms within the shortest possible⁵⁴⁶ period. However, with a view to this complete suppression, recourse to force or compulsory labour may be had, during the transitional period, for public purposes only and as an exceptional measure, subject to certain conditions and guarantees. Furthermore, the competent authority shall not impose or

⁵⁴⁵ Article 2

⁵⁴⁶ Article 3

permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.⁵⁴⁷

Most recently, the same ban on forced or compulsory labour has also been reiterated in the UN 1966 International Covenant on Civil and Political Rights.⁵⁴⁸

3) Slavery for Religious Purposes

The fundamental right to freedom of religious belief, guaranteed by Article 18 of the Universal Declaration of Human Rights, makes it sensitive to criticize any practices prescribed by religion or carried out in a religious context as violation of human rights. However, just as ritual killings have invariably been the subject of prohibition, so certain forms of servitude occur in a religious context, which constitute forms of slavery.

Some such cases also occur as a form of sacrifice: in an effort to atone for an act interpreted as a sin or offence against holy law, families offer one of their members to work unpaid in a religious institution. In several parts of the world for example, girls or women are obliged to live and work in religious institutions and to provide sexual services to priests on the pretext that such women are ‘married’ to a deity. In many cases, they perform other unpaid services, they are not free to change their place of residence or work, and often remain in servitude for many years and retain a distinct status for the rest of their lives.

In other cases, the students or followers of a religious teacher or leader work effectively in servitude, either forwarding all their earnings to their master or working unpaid for long periods in return for religious instruction in an exploitative situation.

9. Vulnerable Groups

⁵⁴⁷ Article 4

⁵⁴⁸ Article 8

The following are groups which are particularly vulnerable and whose conditions of employment; therefore, require special monitoring by the authorities of states, which are committed to preventing slavery:

1) Women

Women are vulnerable both because male employers can use physical force against them and because of the additional possibility of sexual abuse, there are cases where women are clearly forced to work as prostitutes, which evidently violates the Conventions against slavery.

2) Children

Children have already been mentioned above as a group, which is especially vulnerable, particularly when child labour occurs in conjunction with certain other practices, such as debt bondage, early marriage and domestic work. They too are vulnerable to physical abuse and intimidation and face the threat of sexual abuse.

3) Migrant workers

These include both migrants who cross international frontiers to work and those who travel considerable distances within their own country. In both cases, they are deprived of the protection of their own families and others who know them. Those who enter foreign countries illegally to work are particularly at risk, because their illegal status usually puts them effectively beyond the protection of the law. However, people who migrate within their own countries are also at risk. For example, young people are told by recruiting agents that they will receive good pay elsewhere, but then find themselves locked into a factory and are not paid. A solution taken by some states to prevent such exploitation, at least at the inter-state level, has been to replace private recruitment agents by state run employment agencies.

4) Groups attributed low social status

In many parts of the world there are social groups (defined by racial or ethnic origin, religion, class or caste), which for historical or cultural reasons are regarded by their fellow citizens as having near permanent servile status. They belong to distinct and powerless groups, and as a result can be exploited

by others without fear of any consequences. In numerous cases, such groups are subjected to slavery or practices similar to slavery by owners who are frequently allied with those in power and thus able to stifle any complaints or threats of legal action.

5) Nomadic Groups

The process of economic development has frequently led to pastoral and other nomadic groups moving into permanent settlements and abandoning their traditional economy. In such situations, where they have lost their traditional source of food and income, they have been particularly vulnerable to exploitation of their labour.

6) Indigenous Peoples

Similarly, in many countries indigenous people have been prevented from maintaining their traditional economies, either because of government efforts to change local economy or because of the take-over by others of the land they use. Again, with no alternative sources of income, they enter the labour market and frequently become the victims of slavery-like practices.

In the cases outlined above, governments evidently have a responsibility under a variety of international human rights standards to ensure that particularly vulnerable groups are not subjected to discrimination, and have a particular responsibility under the Slavery Conventions to prevent them from being exploited by any slavery-like practices.

Chapter Twenty-Four

RIGHT TO DEVELOPMENT AND ENVIRONEMNT

A: Right to Development

1. Introduction

The list of internationally recognized human rights is by no means exhaustive. Just as the British sociologist T.H. Marshall characterized the 18th century as the century of civil rights, the 19th century as that of political rights and the 20th century as that of social rights, so too some writers over the past two decades have been putting forward claims for some new rights e.g. third generation of solidarity rights, the right to development etc.⁵⁴⁹

According to Bedjaoui, the right to development is a fundamental right, the precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights. In short, it is a core right from which all other rights stem. The international dimension of the right to development is the right to equitable share in the economic and social wellbeing of the world. It is the essential demand of the four fifth of the world's population that the fifth should no longer continue to build its wealth on their poverty.⁵⁵⁰

Ever since the first UN World Conference on Human Rights at Tehran in 1968, the relationship between human rights and development has occupied a prominent place in the international discourse on rights. Since 1977, the debate brings together several important themes e.g. foundations of rights, priority to be accorded to the different rights, the link between human rights and democratic governance, the responsibility of international community towards states whose resources are inadequate, the effects of globalization on economy etc.

⁵⁴⁹ T.H. Marshall, *Citizenship and Social Class* 14 (1950)

⁵⁵⁰ The Right to Development in Bedjaoui, (ed.) *International Law: Achievements and Prospects*, 1177(1991), at p. 1182.

The concept of the right to development was first mooted in 1972. The UN Commission on Human Rights recognized it in 1977. In 1981, the debate was institutionalized through the establishment of a separate Working Group of Experts on the Right to Development. In 1986, the General Assembly adopted the Declaration on the Right to Development. This chronology of events is predated by the emergence of the Third World that led to the elevation of economic development goals to the top of international agenda. The Eastern European countries provided significant political support for all of these demands. The North, for its part, was anxious to insist that the development process and economic rights should be taken seriously but was not prepared to accept its implications on aid and trade.⁵⁵¹

2. Basis of right

It is possible to think of different basis of the right to development as a collective right. The first possibility is to consider the Right to Development as the aggregate of social, economic and cultural rights of all the individuals constituting a collectivity. Another way is to approach it either as the economic dimension of (or inherent or built in) the right of self-determination or at least as a parallel right to self-determination. Some argue that satisfaction of the collective right is a necessary condition, a condition precedent, for the materialization of the individual rights; hence, without self-determination and right to development, civil, political, social and economic rights of the people cannot be realized.⁵⁵²

Bedjaoui considers it as a corollary of the right to life, the ‘primary’ and ‘first’ right that is independent both of international law and the municipal laws of states. Some lawyers consider the Right to Development to be a legal concept and principle enshrined in the UN Charter and find its basis both in the Preamble, in Article 1, paragraph 3, and, above all, in Article 55 of the UN. Others argue that this right is founded on international solidarity based on international interdependence, the universal duty of every

⁵⁵¹ Alston, Philips, “Revitalizing United Nations Work on Human Rights and Development”, 18 Melb. U. L. Rev. 216 (1991) at 218

⁵⁵² George Abi-Saab, The Legal Formulation of a Right to Development, in Academy of International Law, The Right to Development at International level 159 (1980), at 163

state to develop the world economy and the preservation of the human species.⁵⁵³

3. Contents of right

- (1) The right has several aspects, the most important and comprehensive of which is the right of each person (or people) to choose freely its economic and social systems without outside interference or constraint of any kind and to determine, with equal freedom, its own model of development.
- (2) When the national control over economic planning is non-existent, as it has been expropriated by foreign power, it is impossible to speak of sovereign equality of states or of state sovereignty without lapsing into fiction. There is thus a necessary relationship between authentic sovereignty and the right to development.
- (3) The right to development dictates that the people should in no case be deprived of its own means of subsistence.
- (4) The right to development can be stated as ‘to each his due.’ It means that the state seeking its own development is entitled to demand that all other states, the international community and international economic agents collectively do not take away from it what belongs to it and do not deprive it of what is or ‘must be’ its due in international trade. The states may claim a ‘fair price’ of its raw materials and for whatever it offers in its trade with the more developed countries. The claim of such a state is like this: ‘before giving me charity or offering me your aid, give me my due. Perhaps I shall then have no need for your aid. Your charity is my own property that you are handing back to me in this way and, what is more, not all of it.’⁵⁵⁴
- (5) The right to development includes ‘to each according to his needs.’ The relationship between the donor and the recipient states should be seen

⁵⁵³ Bedjaoui, op. cited. At 1182

⁵⁵⁴ Encyclopedia of Human Rights, Oxford University Press,
<https://books.google.com.pk/books?id=1QbX90fmCVUC&pg=RA1-PA24&lpg=RA1>

in terms of responsibility and reciprocal rights over goods that are considered belonging to all. There is no place in such analysis for ‘charity’ or the ‘act of mercy.’ The concept of charity gives place to that of need and justice.

- (6) ‘To each according to his needs’ means that the ‘fair price’ cannot be tied to market mechanism, which cannot achieve an equitable relationship between the producer and the consumer. The fair price should be calculated according to the general principle of responsibility towards the neediest countries. What belongs to the international community and is ‘the common heritage of mankind’ should be shared among all states in accordance with the maxim ‘to each according to his needs.’

4. The Declaration

The General Assembly of the United Nations in 1986 passed a Resolution⁵⁵⁵ on the Right to Development. This was a great breakthrough in popularizing the concept of Right to Development. While adopting the Resolution, the General Assembly had in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian nature. The General Assembly also recognized that development is a comprehensive economic, social and political process, which aims at the constant improvement of the wellbeing of nations and individuals on the basis of their meaningful participation in development and in the fair distribution of benefits.

Main points of the Declaration are:

- 1) The right to development is an inalienable human right by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.

⁵⁵⁵ Resolution No. 41/128 of 1986

- 2) The right to development also implies the full realization of the right of people to self-determination, which includes the exercise of their inalienable right to full sovereignty over their entire natural wealth and resources.⁵⁵⁶
- 3) The human person is central subject of development and should be the active participant and beneficiary of the right to development.
- 4) All human beings have a responsibility for development, which alone can ensure the free and complete fulfilment of the human beings and they should, therefore, promote and protect an appropriate political, social and economic order for development. And the states have right and duty to formulate appropriate national development policies that aim at the constant improvement of the wellbeing of the entire population.⁵⁵⁷
- 5) The states have the primary responsibility for the creation of national and international conditions favourable to the realization of the right o development.⁵⁵⁸
- 6) States have the duty to take steps to formulate international development policies with a view to facilitating the full realization of the right to development. Effective international cooperation and action is required to provide the developing countries means and facilities to foster their comprehensive development.⁵⁵⁹
- 7) All human rights are indivisible and interdependent. All states should cooperate with a view to promoting universal respect for and observance of all human rights and should also take steps to eliminate obstacles to development resulting from failure to civil, political, economic, social and cultural rights.⁵⁶⁰
- 8) The states should undertake all necessary measures for the realization of the right to development and shall ensure equality of opportunity for all

⁵⁵⁶ Article 1 of the Declaration

⁵⁵⁷ Article 2 of the Declaration

⁵⁵⁸ Article 3 of the Declaration

⁵⁵⁹ Article 4 of the Declaration

⁵⁶⁰ Article 6 of the Declaration

in their access to basic resources, education, health services, food, housing, employment and fair distribution in income.

- 9) Women should also have an active role in the development process.
- 10) Appropriate reforms should also be carried out with a view to eradicating all social injustices.⁵⁶¹
- 11) All the aspects of the right to development, set forth here are indivisible and interdependent and each of them should be considered in the context of the whole.⁵⁶²

5. Needs vs rights

Do the economic needs and political rights represent a basic contradiction? This is altogether a wrong way to understand the forces of economic needs and the salience of political rights. The real issues involve taking note of extensive interconnection between the enjoyment of political rights and the appreciation of economic needs. The connection between rights and needs are not merely instrumental, they are also constitutive. The proper conceptualization of economic needs depends on open public debates and those public debates require political rights.

According to Amartya Sen, Lee Kuan Yew, the former Prime Minister of Singapore, had articulated the general theory of negative relationship between political liberty and economic prosperity. It is true that some authoritarian states, such as Singapore, South Korea and China, have had faster rates of economic growth than some less authoritarian states as India, Costa Rica and Jamaica. But the overall picture is much more complex than such isolated observations might suggest. Systematic studies give little support to the view of a general conflict between civil rights and economic performance. In fact some reputable scholars have offered substantial evidence to suggest that political and civil rights have a positive impact on economic progress.

⁵⁶¹ Article 8 of the Declaration

⁵⁶² Article 9 of the Declaration

The processes that led to the economic success of, say, South Korea are now reasonably well understood; a variety of factors played a part, including the use of international markets, an openness to competition, a high level of literacy, successful land reforms and the provision of incentives to encourage growth and exports. There is nothing to indicate that these economic and social policies were inconsistent with greater democracy. Thus, some allegedly negative effects of these rights on economic performance do not refute the fundamental importance of political rights.

Consider the matter of famine. The avoidance of such economic disaster as famine is made much easier by the exercise of various political rights. Famines kill millions of people in different countries but they do not kill rulers. If there are no political rights (elections, free press) the rulers do not have to suffer the political consequences of their failures to prevent famine. Indeed, a free press and active political opposition constitute the best ‘early warning system’ that a country threatened by famine can possess.⁵⁶³

6. Obligation to assist

The Proponents of the right to development want to establish an obligation on the part of the wealthier countries to provide financial and other types of assistance to poorer countries. The issue has also been prominent in relation to the obligations contained in International Covenant on Economic Social and Cultural Rights. The Covenant contains three provisions that could be interpreted as giving rise to an obligation on the part of the richer states to provide assistance to poorer states:

- 1) The first is the phrase –‘individually and through international assistance and cooperation, especially economic and technical.’⁵⁶⁴
- 2) The second is in the provision in Article 11(1) according to which states parties agree to ‘take appropriate steps to ensure the realization of this right (to an adequate standard of living), recognized to this effect the essential importance of international cooperation based on free consent.’

⁵⁶³ Amartya Sen, *Freedoms and Needs*, *The New Republic* 31 (Jan. 10 and 17, 1994), at 32

⁵⁶⁴ Article 2(1) of ICESCR

- 3) In Article 11(2) states parties agree to take, ‘individually and through international cooperation’ relevant measures concerning the right to be free from hunger.

Different and dramatically diverge interpretations of the provisions have been put forward. However, on the basis of the preparatory work it is difficult to sustain the argument that these are legally binding obligations. It would also be unjustified to suggest that these commitments are meaningless.⁵⁶⁵

Consider the following interesting comments of Mohammad Bedjaoui, President of International Court of Justice: we are advocating that ‘the world’s food stocks’ essential to life, that is to say principally grain stocks, be declared to be ‘the common heritage of mankind’ so as to guarantee every people the vital minimum of a bowl of rice or a loaf of bread in order to eradicate the hunger which kills fifty million human beings a year. We are not suggesting this out of moral idealism but out of a concern to avoid a dangerous impasse in international relations.

Why, for example, should not the twentieth century be equal to the spirituality of the seventh century when the Quran announced to all mankind that ‘all wealth, all things belong to Allah’ and thus to humanity, and that consequently ‘Zakat,’ the act of charity, should be seen as a ‘compulsory institutionalized act, a manifestation of human solidarity, making it every man’s duty to give away one tenth of his wealth each year.

Is the twentieth century incapable of matching the principles of solidarity stated by the lawyer Vattel in 1758, when he affirmed that each nation must contribute, by every means in its power, to the happiness and perfection of others?⁵⁶⁶

⁵⁶⁵ Alston and Quinn, the Nature of the Obligations under the ICESCR, 9 Hum. Rts. Q. 156(1987) at 186

⁵⁶⁶ Bedjaoui, op. cited. At 1996

7. Foreign Aid

Normally foreign aid serves no developmental purpose but is used instead to promote the exports of the donor country and to encourage the use of imported capital-intensive methods of production or to strengthen the police or the armed forces of the recipient country. Nevertheless, there is evidence that when the donor and the recipient act responsibly, foreign aid can indeed be of benefit. Griffin and Khan have suggested the following measures for rationalization of the aid system:

- 1) The aid should be de-politicized by bringing it under the control of a supranational Authority operating under clearly defined and agreed principles,
- 2) Most foreign aid, if not the all, be channelled through this Authority while individual countries will be free to supplement multilateral assistance with bilateral programmes if they wish so.
- 3) All multilateral aid should be allocated to countries representing the poorest 60% of the world's population e.g. only countries with a per capita income of about \$700 or less would be eligible for aid.
- 4) The criteria for determining the amount of aid allocated to such eligible countries should reflect:
 - a) The severity of poverty as measured by the shortfall of real per capital income from the agreed threshold;
 - b) The degree of commitment to human development as demonstrated by recent successes and current programmes; and
 - c) The size of population.
- 5) The desired total amount of foreign aid must be set as an agreed proportion of the combined GNP of all potential recipients.
- 6) The burden of financing this total aid should be distributed among the donor countries progressively so that a richer country contributes a higher proportion of its per capita income than a less rich country. This

would make the total volume of aid predictable and the distribution of its burden among the donors equitable.⁵⁶⁷

8. International assistance

Article 22 of the Covenant on Economic, Social and Cultural Rights establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations' bodies any matter arising out of reports submitted under the Covenant. The Committee on Economic, Social and Cultural Rights advises and assists the Council in this regard. Recommendations can be made to any organ of the UN, their subsidiary organs or specialized agencies involved in any aspect of international development cooperation.

The Committee in its Report of 1990, has made the following comments:

- 1) UN agencies should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights. They should avoid projects that involve violations of human rights and they should encourage projects, which enhance enjoyment of the full range of human rights.
- 2) The UN agencies should recognize the intimate relationship, which should be established between development activities and efforts to promote respect for human rights.
- 3) As per proposal made by the General Assembly in 1979, a 'Human Right Impact' statement be required to be prepared about all major development cooperation activities.
- 4) Every effort should be made, at each phase of a development project (identification, design, implementation and evaluation) to ensure that the rights contained in the Covenant are duly taken into account.
- 5) Adjustments for debt burden must take care of the most basic rights.

⁵⁶⁷ Keith Griffin and A.R. Khan, *Globalization and Developing World*, 1992, at 90.

- 6) Such an approach is called ‘adjustment with a human face’ or as promoting the human dimension of development.⁵⁶⁸

9. Globalization

The General Assembly of the UN has passed a Resolution on 10th October 2010, highlighting the linkages between human rights and globalization. It explains all the problems and possible solutions. Its main points are:

- 1) All human rights are universal, indivisible, interdependent and interrelated and that the international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis;
- 2) Globalization affects all countries differently and makes them more exposed to external developments, positive as well as negative, inter alia, in the field of human rights;
- 3) Globalization is not merely an economic process, but that it also has social, political, environmental, cultural and legal dimensions, which have an impact on the full enjoyment of all human rights;
- 4) All cultures form part of the common heritage belonging to all humankind, and globalization poses more of a threat to cultural diversity if the developing world remains poor and marginalized;
- 5) The rising global food and energy challenges and climate change the negative impact on social and economic development and on the full enjoyment of all human rights for all;
- 6) Globalization should be guided by the fundamental principles that underpin the corpus of human rights, such as equity, participation, accountability, non-discrimination, respect for diversity, tolerance and international cooperation and solidarity;
- 7) There is greater acceptance that the increasing debt burden faced by the most indebted developing countries is unsustainable and constitutes one of the principal obstacles to achieving sustainable development and poverty eradication;
- 8) There is inadequacy of measures to narrow the widening gap between the developed and the developing countries, and within countries, which has contributed to, inter alia, deepening poverty and has adversely affected the full enjoyment of all human rights, in particular in developing countries;

⁵⁶⁸ UN Doc. E./1990/23, Annex.III

- 9) Transnational corporations and other business enterprises have a responsibility to respect all human rights;
- 10) Narrowing the gap between rich and poor, both within and between countries, is an explicit goal at the national and international levels, as part of the effort to create an enabling environment for the full enjoyment of all human rights;
- 11) Commitment needed to create an environment at both the national and the global levels that is conducive to development and to the eradication of poverty by, inter alia, promoting good governance, eliminating protectionism, enhancing transparency in the financial, monetary and trading systems, and committing to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system;
- 12) Global economic and financial crises are still having bad impact on the ability of countries, particularly developing countries; hence, all States and the international community shall alleviate, any negative impacts of these crises on the realization and the effective enjoyment of all human rights;
- 13) Relevant United Nations organizations should be assured the resources needed to expand and enhance their food assistance, and support safety net programmes designed to address hunger and malnutrition, when appropriate, through the use of local or regional purchase;
- 14) Responsible operations of transnational corporations and other business enterprises can contribute to the promotion, protection and fulfilment of all human rights and fundamental freedoms, in particular economic, social and cultural rights;
- 15) Only through broad and sustained efforts, including policies and measures at the global level to create a shared future based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable and have a human face, thus contributing to the full enjoyment of all human rights; there is an urgent need to establish an equitable, transparent and democratic international system to strengthen and broaden the participation of developing countries in international economic decision-making and norm-setting; and
- 16) International community should strive to respond to the challenges and opportunities posed by globalization in a manner that promotes and protects human rights while ensuring respect for the cultural diversity of all.⁵⁶⁹

⁵⁶⁹ United Nations, General Assembly, Sixty-fifth session, Third Committee
: Globalization and its impact on the full enjoyment of all human rights; 10 Oct 2010

B: Right to Healthy Environment

1) Introduction

Although there were attempts to develop international environmental law in the 19th century, it was not until the Stockholm Conference in 1972, that the right to a healthy environment was explicitly recognized in an international environmental law. The conference adopted what is known as the Stockholm Declaration, consisting of three non-binding instruments: a resolution on institutional and financial arrangements; a declaration containing 26 principles; and an action plan containing 109 recommendations.

Principle 1 of the Stockholm Declaration linked environmental protection to human rights norms: ‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generations.’

This Conference influenced legal and institutional development; one of its influences was the creation of the United Nations Environment Programme (UNEP) that led to the development of the 1982 United Nations Conventions on the Law of the Sea (UNCLOS), a comprehensive framework for the establishment of global rules on the protection of the marine environment and marine living resources.

In 1983, the UN General Assembly created the World Commission on Environment and Development (WCED), chaired by Norwegian Prime Minister Gro Harlem Brundtland. The WCED was established as an independent body linked to, but outside the control of, both governments and the UN system. In December 1987, the WCED published the Brundtland Report, which, among other things, created a new terminology - sustainable development - and placed economic development activities within the context of environmental limitations. The Brundtland Report also called for a second UN conference to address the question of environment and development.

2) UNFCCC

Twenty years after Stockholm, in June 1992, the UN Conference on Environment and Development (UNCED) was held in Rio de Janeiro, Brazil. The purpose of the conference was to elaborate strategies and measures to halt and

reverse the effects of environmental degradation and to strengthen national and international efforts to promote sustainable and environmentally sound development in all countries. It generated the United Nations Framework Convention on Climate Change (UNFCCC) that was opened for signature at the Earth Summit in Rio de Janeiro from 3rd to 14th June 1992, and entered into force on 21st March 1994. It is an international environmental treaty. Its main features are:

- 1) The UNFCCC objective is to ‘stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.’
- 2) The framework sets non-binding limits on greenhouse gas emissions for individual countries and contains no enforcement mechanisms. Instead, the framework outlines how specific international treaties (called ‘Protocols’ or ‘Agreements’) may be negotiated to specify further action towards the objective of the UNFCCC.
- 3) The UNFCCC endorses the concept of common but differentiated responsibility in the climate context. This means that while developing country parties are expected to contribute to climate mitigation, because of superior capacity to undertake mitigation and greater contribution to the problem of climate change as a result of historical emissions, developed countries are expected to ‘take the lead in combating climate change and the adverse effects thereof.’
- 4) The Convention repeatedly references the need to promote sustainable economic growth, particularly in developing countries; developing countries are subject to less stringent reporting and other requirements than developed countries under the Convention, and the performance of developing country parties is expressly conditioned on the adequate provision of financial support and technology transfer from developed country parties.
- 5) The UNFCCC instituted a process for countries to generate and share data about domestic GHG emissions. Under the UNFCCC, all parties are required to submit national GHG inventories, and developed country parties are required to submit more detailed descriptions of mitigation policies and projections of the projected impact of these policies on GHG emissions.
- 6) The UNFCCC has provided the basic institutional structures. The Convention established a Conference of the Parties, a secretariat, and

subsidiary bodies that oversee implementation of the Convention and related instruments within its mandate.⁵⁷⁰

3) Kyoto Protocol

After the signing of the UNFCCC treaty, Parties to the UNFCCC have met at conferences (COPs) to discuss how to achieve the treaty's aims and it led to the Kyoto Protocol (2005) that sets emissions targets for developed countries which are binding under international law.

The Kyoto Protocol has had two commitment periods, the first commitment period started in 2008, and ended in 2012. During this period, 37 industrialized countries and the European Community (EU-15) agreed to reduce GHG emissions to an average of 5% against 1990 levels. Through the Burden-Sharing agreement, EU-15 decided to reduce its GHG emissions by 8% in the first period, using a combination of environmental policies and measures. During the second commitment period (from 2013, to 2020), Parties committed to reduce GHG (Green House Gases) emissions by at least 18% below 1990 levels in the eight-year period. At the same time, the EU and its Member States have decided a Burden-Sharing equal to a 20% emission reduction from 2013 to 2020 compared to the base year (1990, for most member States).

A GHG inventory can help local authorities at national and sub-national scale to:

- a. Identify the sectors, sources, and activities within their jurisdiction that are responsible for GHG emissions;
- b. Quantify emission trends and variations;
- c. Evaluate the effects of activities able to reduce emissions;
- d. Develop a local action plan in order to decrease emissions;
- e. Track progress in reducing emissions; and
- f. Set goals and targets for future reductions.

4) Paris Agreement

In 2011, parties adopted the 'Durban Platform for Enhanced Action' under which parties have agreed to 'develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.' At Durban and Doha, parties noted 'with grave concern' that current efforts to hold

⁵⁷⁰ <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/united-nations-framework-convention-on-climate-change>

global warming to below 2 or 1.5 °C relative to the pre-industrial level appear inadequate.

In 2015, all (then) 196 parties to the convention came together for the UN Climate Change Conference on 30th November-12 December in Paris and adopted by consensus the Paris Agreement, aimed at limiting global warming to less than two degrees Celsius, and pursue efforts to limit the rise to 1.5 degrees Celsius. This Agreement entered into force on 4th November 2016.

5) UN Report

A recent UN Report (2015) says that it has long been recognized that a clean, healthy and functional environment is integral to the enjoyment of human rights, such as the rights to life, health, food and an adequate standard of living. Anthropogenic climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced. The latest assessment report from the Intergovernmental Panel on Climate Change (IPCC) describes how observed and predicted changes in climate will adversely affect billions of people and the ecosystems, natural resources, physical infrastructure upon which they depend, and access to clean water, food, and other key resources that support human life.

Climate change is already affecting temperatures, hydrologic conditions, ecosystem functioning, and agricultural productivity in many regions. Displacement is also an imminent prospect for some communities, such as those situated in the rapidly melting Arctic and low-lying coastal areas. Further complicating the picture, measures undertaken to mitigate greenhouse gas (GHG) emissions and adapt to climate change can themselves adversely affect the enjoyment. The international community has pledged to allocate or direct \$100 billion (US) per year to funding mitigation and adaptation projects in developing nations.

The impacts of climate change on freshwater resources, ecosystems, and human settlements are already undermining access to clean water, food, shelter, and other basic human needs; interfering with livelihoods; and displacing people from their homes. Even if we remain within the international goal of 2° C of global warming, these impacts will expand dramatically in the coming decades. These impacts constitute a serious interference with the exercise of fundamental human rights, such as the rights to life, health, water, food, housing, and an adequate standard of living.

The UN agencies and national governments have come to understand the relationship between climate change and human rights. These include:

- 1) Procedural obligations for all governments to ensure that the affected public is: (i) adequately informed about the impacts of climate change and the measures undertaken to both mitigate and adapt to climate change; (ii) adequately involved in public decisions about climate change; and (iii) given access to administrative, judicial, and other remedies when rights are violated as a result of climate change and responses to it.
- 2) Substantive obligations for all governments to: (i) protect human rights from climate-related harms; (ii) respond to the core drivers of climate change by regulating GHG emissions within their jurisdiction; (iii) cooperate internationally to protect human rights against climate-related harms; (iv) address the transboundary impacts of climate change; and (v) safeguard human rights in all mitigation and adaptation activities.
- 3) States also have unique obligations with respect to certain groups, including women, children, and indigenous peoples. Notably, states must obtain free, prior and informed consent before undertaking any measures that would adversely affect the traditional lands and resources of indigenous peoples.
- 4) Private actors also have obligations to address the human rights implications of climate change, and should refer to the UN Guiding Principles on Business and Human Rights to ensure that they fully respect human rights in all activities.⁵⁷¹

6) Other Instruments

Furthermore, in relation to environmental obligations, certain treaties, of potentially global application include:

- a. The 1972 World Heritage Convention, whose purpose is to create a list of natural and cultural sites whose irreplaceable value should be preserved for future generations and to ensure the sites' protection through international cooperation.
- b. The 1985 Vienna Convention, whose purpose is to set up a framework within which countries can cooperate to tackle the problem of ozone depletion.

⁵⁷¹ https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightsclimate-change.pdf.pdf?sequence=2&BisAllowed=

- c. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (UNEP), which aims to reduce and eventually eliminate the emissions of man-made ozone depleting substances.
- d. The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (UNEP), which obligates parties to reduce to a minimum the transboundary movements of hazardous wastes; to ensure that such wastes are managed and disposed of in an environmentally sound manner, as close as possible to their source of generation; and to reduce to a minimum the generation of hazardous wastes at the source.
- e. The 1992 Convention on Biological Diversity (UNEP), whose objectives are to conserve biological diversity as well as encourage sustainable, fair and equitable use and benefits of genetic resources.

Chapter Twenty-Five

ISLAMIC PERSPECTIVE ON HUMAN RIGHTS

1. Introduction

Islam since its very advent has been propagating human rights. The Charter of Medina, a Social Contract freely negotiated between various tribes of the Quraish (Mohajeroon),⁵⁷² the Jews, Bani Khazraj and Bani Oaus etc. (Ansaar)⁵⁷³ had contained various specific provisions for the protection of human rights especially of the weak and vulnerable. The Last Sermon⁵⁷⁴ of the Prophet Muhammad (PBUH) is a classic example of a Charter of Human Rights.

The Cairo Declaration on Human Rights in Islam (CDHRI) is usually seen as an Islamic response to the United Nations' Universal Declaration of Human Rights (UDHR) of 1948. Some Muslim countries, such as Sudan, Iran, and Saudi Arabia, had frequently criticized the Universal Declaration of Human Rights for its perceived failure to take into account the cultural and religious context of non-Western countries. The CDHRI was adopted by the Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt, from 9-14 Muharram 1411H (31st July to 5th August 1990).

The CDHRI provides an overview on the Islamic perspective on human rights. CDHRI declares its purpose to be “general guidance for Member States of the OIC in the field of human rights.”⁵⁷⁵ It declares that all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah and the Islamic Sharia’ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.⁵⁷⁶

⁵⁷² The people and tribes who migrated with the Prophet Muhammad to Medina called “Mohajeroon”- Those who migrated.

⁵⁷³ The people and tribes who welcomed Prophet and supported him in Medina are called “Ansaar”-helpers.

⁵⁷⁴ Also called as ‘Khutbaa Hajja-tul-Vidaa’-sermon on last Hajj-pilgrimage to Makah

⁵⁷⁵ Preamble

⁵⁷⁶ Articles 24 and 25

The West has criticized the CDHRI on the grounds that the CDHRI, being based on religion, limits Human Rights, Religious Freedom and Freedom of Expression as enshrined in the Universal Declaration of Human Rights and other International Covenants.⁵⁷⁷

2. Underlying principles

The Preamble of the CDHRI explains the Fundamental principles that are basis of all of its provisions. They include:

- a) Mankind in Islam is vicegerent of Allah on Earth;
- b) Islamic Ummah is made by Allah as the best community that gave humanity a universal and well-balanced civilization, in which harmony is established between here and the hereafter, knowledge is combined with faith;
- c) Mankind needs to be protected from exploitation and persecution, and it has right to a dignified life in accordance with the Islamic Shari'ah.
- d) Mankind has reached an advanced stage in materialistic science but still is in dire need of faith to support its civilization as well as a self-motivating force to guard its rights;
- e) Fundamental rights and freedoms are an integral part of the Islamic religion and that no one shall have the right to abolish them and safeguarding of these fundamental rights and freedoms is an individual responsibility of every person and a collective responsibility of the entire Ummah.

3. Guaranteed rights

The CDHRI guarantees the following Rights and Freedoms:

- 1) Equality of humanity (Article 1)

⁵⁷⁷ Joint written statement submitted by the International Humanist and Ethical Union (IHEU), the Association of World Education (AWE), and the Association of World Citizens (AWC), International Humanist News, 28 May, 2008

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|-----|------------------------------------|--------------|
| 2) | Right to life | (Article 2) |
| 3) | Right in armed conflict | (Article 3) |
| 4) | Right to dignity | (Article 4) |
| 5) | Right to family | (Article 4) |
| 6) | Rights of women | (Article 6) |
| 7) | Rights of child | (Article 6) |
| 8) | Right to eligibility | (Article 8) |
| 9) | Right to education | (Article 9) |
| 10) | Choice of religion | (Article 10) |
| 11) | Right to freedom | (Article 11) |
| 12) | Freedom of movement | (Article 12) |
| 13) | Right to work | (Article 13) |
| 14) | Right to legitimate living | (Article 14) |
| 15) | Right to property | (Article 15) |
| 16) | Intellectual property rights | (Article 16) |
| 17) | Right to decent living | (Article 17) |
| 18) | Right to security and privacy | (Article 18) |
| 19) | Right to equality and justice | (Article 19) |
| 20) | Protection from arrest and torture | (Article 20) |
| 21) | Protection from taking hostage | (Article 21) |
| 22) | Freedom of expression | (Article 22) |
| 23) | Political rights | (Article 23) |

1) Equality of Humanity

All human beings are equal in terms of basic human dignity and basic obligations and responsibilities. There cannot be any discrimination on the

basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations.

The reasons for this equality are that:

- (i) All human being form one family; when all are from one family, then there is no difference amongst themselves;
- (ii) These one family members are united by their subordination to Allah and descent from Adam; there is equality based on the purpose in life and one common lineage;
- (iii) Islam, being the true religion, guarantees for enhancing such equality and dignity along the path to human integrity;
- (iv) The most loved by Allah are those who are most beneficial to His subjects, so if one has to be 'first among equals,' then he has to excel in service to other human beings;
- (v) No one has superiority over another except on the basis of piety and good deeds. And if at all, there is a distinction, it is based on purity of soul and righteous life style rather than any other criterion.

2) Right to life

Under Muslim Jurisprudence and Philosophy, life is a God-given gift and the right to life is guaranteed to every human being. No one has the authority to take this gift away from anybody; even the individual himself cannot take his life as it has been bestowed upon him as a precious gift from his Lord. Therefore, homicide and suicide is prohibited. This is the right guaranteed to human beings, be they Muslim or Hindu, old or young, healthy or infirm, Eastern or Western. So life of a non-believer is as sacred as that of a believer.

It is the duty of individuals, Societies and States to safeguard this right against any violation whatsoever. Every individual including oneself, every member of the Society and every organ of the State (Executive, Legislature and Judiciary) have to take all possible and reasonable steps to protect and promote this sacred right. There are limited exceptions to this right and these

exceptions are already declared in Shari'ah e.g. Shari'ah has already prescribed death penalty in certain offences.

In addition to the protection of right to life of an individual, it is also forbidden to resort to any means whatsoever, which could result in the genocidal annihilation of mankind. The use of the word, 'could' instead of 'shall' is worth consideration. If any means can possibly result into any aspect of 'genocide,' it is also prohibited.

As a motive and basis of the protection of this sacred right, it is declared that the preservation of human life, throughout the life span willed by Allah, is a duty prescribed by Shari'ah. It means that it is obligatory Islamic duty of everyone to protect this right to life of oneself and of every other person as it is the command of Allah Almighty and if one desists from this duty, he will be penalized.

Similarly, this right to life also extends to every kind of bodily harm or hurt or injury. Therefore, safety from any bodily harm is also a guaranteed right. It is the duty of the State to safeguard it, and it is prohibited to breach it without a Shari'ah-prescribed reason. In other words, no individual or a State organ can breach this duty without any cogent reason prescribed under Islamic Law.

3) Rights in armed conflict

Islam guarantees certain rights in the times of use of force or any armed conflict. In the event of the use of force and in case of any armed conflict, it is not allowed to kill non-combatants such as old men, women and children. The use of force has to be restricted to only combatants and the non-combatants and other civilians have to be protected at all costs.

Similarly, the sick and the injured combatants as well as non-combatants shall have the right to proper medical treatment. All the prisoners of war shall have the right to be adequately fed properly sheltered and decently clothed.

Even in the rage of a war, it is absolutely prohibited to mutilate or dismember dead bodies even of the fighting enemy, not to speak of ordinary

civilians. The prisoners of war have right to be exchanged. Similarly, if certain families are displaced due to use of force or war, then arrangements shall be made for visits or reunions of families separated by circumstances of war.

During the war or use of force, or any military operation, natural environment has to be protected as far as possible. It is prohibited to cut down trees, to destroy crops or livestock, to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means. In other words, damage has to be controlled and it shall be limited to only combatants and military installations.

4) Right to dignity

Every human being, young or old, man or woman, believer or non-believer, black or white, is entitled to human sanctity and the protection of one's good name and honour during one's life and even after one's death, no one can damage the sanctity of name and honour. This right to dignity does not end at death but extends beyond that. It is the duty of both the State and the Society, to protect one's body and burial place from desecration.

5) Right to family

Family is the very foundation of society, and marriage is the very foundation of family. All, men and women, have the fundamental right to marriage, and no restrictions stemming from race, colour or nationality shall prevent them from exercising this right. On the other side, the society and the State shall remove all obstacles to marriage and facilitate it, and shall protect the family and safeguard its welfare.

6) Rights of Women

Woman is equal to man in human dignity, and has her own rights to enjoy and duties to perform, and has her own civil entity and financial independence, and the right to retain her name and lineage. The husband is responsible for the maintenance and welfare of the family - the provider.

7) Rights of child

From the very moment of birth, every child has rights to proper nursing, education and material, hygienic and moral care. These rights are due from the parents, the society and the State. Both the fetus and the mother must be safeguarded and accorded special care.

The parents and those in such like capacity (like guardian or kafeel) have the right to choose the type of education they desire for their children but they shall take into consideration the interest and future of the children in accordance with ethical values and the principles of the Shari'ah. Similarly, both parents are entitled to certain rights from their children and relatives are also entitled to rights from their kin and all such rights and liabilities have to be determined and performed in accordance with the tenets of the Shari'ah. Later parts of these rights are not included in Universal Declaration of Human Rights.

8) Right to Eligibility

Every human being has the right to enjoy a legitimate eligibility with all its prerogatives and obligation and in case such eligibility is lost or impaired, the person shall have the right to be represented by his/her guardian.

9) Right to Education

Seeking knowledge is an obligation of every person and provision of education to mankind is the duty of the Society and the State. In other words, education is a duty as well as a right. It is a duty of an individual to get education and it is his right that Society and State provide him education. The State shall ensure the availability of ways and means to acquire education and shall guarantee its diversity in the interest of the Society so as to enable man to be acquainted with the religion of Islam and uncover the secrets of the Universe for the benefit of mankind. The ultimate objective of education is to understand the religion (the ultimate purpose of life and the way of life) and to be beneficial of the mankind.

There is no difference between religious and temporal education. Every human being has a right to receive both religious and worldly education from various institutions of teaching, education and guidance, including the family,

the school, the university, the media, etc. This education shall be imparted in an integrated and balanced manner to develop (i) human personality, (ii) strengthen man's faith in Allah and (iii) promote man's respect to and defence of both rights and obligations.

10) Choice of religion

There is no coercion in Islam. Therefore, it is prohibited to pressure or to exploit poverty or ignorance to force someone to convert to Islam. Islam guarantees freedom of choice of religion and protects mankind from every pressure – political, moral, economic or social – to change someone's religion forcibly.

11) Right to freedom

Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them. There can be no subjugation but to Allah, the Almighty. Colonialism of all types, being one of the most evil forms of enslavement, is totally prohibited. Colonized people have the full right to freedom and self-determination.

It is the duty of all States and peoples to support the struggle of colonized peoples for the liquidation of all forms of occupation, and all States and peoples have the right to preserve their independent identity and have control of their wealth and natural resources,

12) Freedom of movement

Every man shall have the right to free movement and to select his place of residence whether within or outside his country and this right has to be exercised within the framework of the Shari'ah. If he is persecuted somewhere, then he is entitled to seek asylum in another country. In such case, it is the obligation of the country of refuge to provide protection to the asylum-seeker until his safety has been attained. There is no such obligation if committing an act regarded by the Shari'ah as a crime motivates asylum.

13) Right to work

Right to work is guaranteed by the State and the Society for each able person with capability to work. Everyone shall be free to choose the work that suits him best and which serves his interests as well as those of the Society.

Every employee shall have the right to enjoy safety and security as well as all other social guarantees. The employee cannot be assigned work beyond his capacity. He cannot be subjected to compulsion or exploited or harmed in any way in his work.

The employee shall be entitled, without any discrimination between males and females, to fair wages for his work-without delay, as well as to the holidays, allowances and promotions, to which he is entitled. On his part, the employee shall be required to be dedicated and meticulous in his work. If there is disagreement between workers and employers on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.

14) Right to legitimate living

Every person shall have the right to earn a legitimate living without monopolization of resources, deceit or causing harm to oneself or to others. Usury (*riba*) is explicitly prohibited.

15) Right to property

Everyone shall have the right to own all forms of property acquired in a legitimate way, and shall be entitled to the rights of ownership without prejudice to oneself, others or the Society in general. Expropriation, in any form, is not permissible except (i) in public interest and (ii) upon payment of prompt and fair compensation. Similarly, private property cannot be confiscated and seized except for a necessity dictated by law.

16) Intellectual property rights

Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical labour of which he is the author. He shall have

the right to the protection of his moral and material interests stemming therefrom, provided it is not contrary to the principles as laid down in the Shari'ah.

17) Right to decent living

Everyone shall have the right to live in a clean environment, away from vice and moral corruption that would favour a healthy ethical development of his person. It is the obligation of the State and Society in general to ensure that right.

Everyone shall have the right to medical and social care, and to all public amenities provided by Society and the State within the limits of their available resources. The State shall ensure the right of the individual to a decent living that may enable him and his dependents to meet requirements like food, clothing, housing, education, medical care and all other basic needs.

18) Right to security and privacy

Security of life and property is the right of every citizen. Similarly, everyone has the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. It is the duty of State to protect him from arbitrary interference.

A private residence (house) is inviolable in all cases. No one can enter in it without permission from its inmates or without due process of law. It cannot be demolished or confiscated and its dwellers cannot be evicted arbitrarily.

19) Right to equality and justice

All individuals are equal before the law, without any distinction between the ruler and the ruled. The right to justice is guaranteed to everyone. Liability is in essence personal and one cannot be burdened for the

liability of the others, there shall be no crime or punishment except as provided for in the Shari'ah. An accused is innocent until his guilt is proven in a fast and fair trial in which he shall be given all the guarantees of defence.

20) Protection from arrest and torture

It is not allowed to arrest an individual, or restrict his freedom, to exile or to punish him without a legitimate reason. It is not allowed to subject him to any physical or psychological torture or to any form of maltreatment, cruelty or indignity. No one can be subjected to any medical or scientific experiment without his consent or at the risk of his health or of his life. The State is not permitted to promulgate emergency laws that would provide any executive authority for such actions.

21) Protection from taking hostage

Taking humans as hostages is expressly forbidden; it is not allowed in any form or for any purpose.

22) Freedom of expression

Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah. Similarly, every person shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.

Information is a vital necessity to Society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of prophets, undermine moral and ethical values or disintegrate, corrupt or harm Society or weaken its faith. It is also not permitted to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.

23) Political rights

Authority is a sacred trust and its abuse or malicious exploitation is explicitly prohibited. This protection is there in order to guarantee fundamental human rights.

Everyone shall have the right to participate, directly or indirectly, in the administration of public affairs of his country. He shall also have the right to assume public office in accordance with the provisions of Shari'ah.

Chapter Twenty-Six

NGOs AS AGENTS OF HUMAN RIGHTS

There are thousands of non-governmental organizations that are working worldwide for the promotion of human rights. Majority of Organizations work locally i.e., within the jurisdiction of a certain state whereas some NGOs work internationally. In this Chapter we will briefly discuss about some of International Non-governmental organizations that can be considered leaders in this field.

1. International Committee of Red Cross

It is a predominantly Swiss Organization with close links to the Swiss Government. It is considered an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent human sufferings by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.⁵⁷⁸

The International Red Cross and Red Crescent Movement are made up of the National Societies. Although each of the Movement's components engages in different activities, they are all united by the same Fundamental Principles: humanity, impartiality, neutrality, independent voluntary service, unity and universality.

As its founding institution, the ICRC has certain statutory responsibilities towards the Movement. In particular, it is responsible for ensuring respect for and promoting knowledge of the Fundamental Principles, recognizing new National Red Cross or Red Crescent Societies, which meet the current conditions for recognition, and discharging the mandates, entrusted to it by the International Conference of the Red Cross

⁵⁷⁸ In the Muslim countries, the Red Cross societies are called Red Crescent Societies.

and Red Crescent. The ICRC takes an active part in the Movement's statutory meetings, which it often organises jointly with the Federation.

In accomplishing these tasks the ICRC maintains close relations with the National Societies, cooperating with them in areas of mutual interest such as preparedness for situations of armed conflict, development and ratification of and respect for the Geneva Conventions, and dissemination of humanitarian law and the Fundamental Principles. It also acts as lead agency for international relief operations conducted by the Red Cross and Red Crescent in situations of international and non-international armed conflict, internal strife and their direct results, as well as in situations of armed conflict concomitant with natural or technological disasters.

Finally, while fully respecting the Federation's competence in the matter, the ICRC cooperates actively in the development of National Red Cross and Red Crescent Societies, in particular through technical and legal assistance, by supporting the National Societies' dissemination programmes and by contributing to the training of their staff in areas that fall within its mandate.⁵⁷⁹

2. International Commission of Jurists

The International Commission of Jurists (ICJ) is an international non-governmental organization devoted to the promotion of the understanding and observance of the rule of law as well as the promotion and legal protection of human rights throughout the world.

A special focus of the ICJ is the interdependence and interrelation of economic, social, cultural, civil and political rights under the Rule of Law, without which there can be no meaningful development.

Based in Geneva, the ICJ has consultative status with the United Nations Economic and Social Council, UNESCO, the Organization of African Unity and the Council of Europe.

⁵⁷⁹ This portion of the chapter is prepared by the material available on the official web site of the International Committee of the Red Cross.

Commission membership is limited to 45 eminent jurists who are representative of the different legal systems of the world to assist in carrying out its work; the International Secretariat of the ICJ benefits from a network of independent national section and affiliated legal organizations in Africa, Asia, Australia, Eastern and Western Europe, the Middle East, as well as Latin and North America and the Caribbean.

The commission was founded in 1952 in Berlin. It created Centre for the Independence of the Judiciary and the legal Profession to protect the human rights of persons working in legal professions.

The ICJ was awarded the first European Human Rights Prize by the Council of Europe in 1980, the Waiter Peace Prize in 1984, the Erasmus Prize in 1989, and the United Nations Award for Human Rights in 1993. In order to promote human rights and the rule of law, the ICJ has a wide range of activities in Geneva and around the world.⁵⁸⁰

3. Lawyers Committee for Human Rights

It is based in New York and draws financial support from foundations and Law firms. Since 1978, the Lawyers Committee for Human Rights has worked to protect and promote fundamental human rights. Its work is impartial, holding all governments accountable to the standards affirmed in the International Bill of Human Rights. Its programmes focus on building the legal institutions and structures that will guarantee human rights in the long term, strengthening independent human rights advocacy at the local level is a key feature of its work.

The Committee also seeks to influence the US Government to promote the rule of law in both its foreign and domestic policy, and presses for greater integration of human rights into the work of the UN and the World Bank. The Committee works to protect refugees through the representation of asylum seekers and by challenging legal restrictions on the rights of refugees in the United States and around the world.

⁵⁸⁰ This portion of the chapter is prepared with the help of the material available on the official web site of the International Jurist Commission

The Committee is also lobbying for establishing International Criminal Court, protection of asylum seekers and human rights advocates and advancing legal reforms in China and Hong Kong.⁵⁸¹

4. Anti-Slavery International

The Anti-Slavery International is based in London. It was originally established as the anti-Slavery Society. Anti-Slavery International is the oldest human rights organization in the world. It was responsible for the abolition of slavery within the British Empire in 1833, and was set up in its present form in 1839, to carry the fight to other parts of the world.

It gave inspiration to the abolitionist movement in the United States and Brazil and has contributed to the formulation of all the relevant international standards on slavery.

Throughout its history, it has campaigned relentlessly and intervened effectively on behalf of enslaved people. Generally, it is the most marginalized and dispossessed groups that fall victim to slavery, and the anti-slavery movement has always been closely allied with the struggle of indigenous people.

Since its merger with the Aborigines' Protection Society in 1909, Anti-Slavery International has formally included the promotion of the rights of indigenous peoples within its mandate.

Today the role of this small, agile and dedicated organization is more important than ever. Anti-Slavery International (ASI) promotes the eradication of slavery and slavery-like practices, and freedom for everyone who is subjected to them. The abuses which ASI opposes include: slavery and the buying and selling of people as objects; trafficking of women and the predicament of migrant workers who are trapped into servitude; debt bondage and other traditions which force people into low status work; forced labour; force prostitution; abusive forms of child labour; and early or forced marriage and other forms of servile marriage. ASI focuses on the rights of

⁵⁸¹ This is based on the material available on the official web site of the Lawyers Committee for Human Rights

people who are particularly vulnerable to exploitation of their labour, notably women, children, migrant workers and indigenous peoples.

ASI pursues its objectives by:

- 1) Collecting information about these abuses, bringing them to the attention of the public and promoting public action to end them;
- 2) Identifying ways in which these abuses can be brought to an end, and influencing policy-makers in governments or other institutions at national and international level to take action accordingly; and
- 3) Supporting victims of the abuses, which ASI opposes in their struggle for freedom, in particular by working with organizations they establish and other organizations campaigning on their behalf.

5. Human Rights Watch

It is the largest US organization in this field. It began in 1978, with the founding of its Helsinki division. Today, it includes five divisions covering Africa, the Americas, Asia, the Middle East, as well as the signatories of the Helsinki Accords. It also includes five collaborative projects on arms transfer, children's rights, free expression, prison conditions, and women's rights. It has its office in London, Moscow, Hong Kong, Belgrade, Zagreb, Rio de Janeiro and Dushanbe.

Human rights Watch is dedicated to protecting the human rights of people around the world. It stands with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice. It investigates and exposes human rights violations and holds abusers accountable. It challenges governments and those who hold power to end abusive practices and respect international human rights law. It enlists the public and the international community to support the cause of human rights for all.

The academic freedom programme aims to monitor, expose, and mobilize concerted action to challenge threats to academic freedom worldwide and to foster greater scholarly and media attention to the critical role played by institutions of higher education in the promotion of human

rights and the development and preservation of civil society. The programme brings together the expertise of Human Rights Watch staff and the committed efforts of the academic leaders and prominent scholars who form the Human Rights Watch's Academic Freedom Committee.⁵⁸²

Now even the most abusing governments at least pay a lip service to human rights but most Multinational Corporations still argue that they do not bear any responsibility for human rights in the places where they trade and invest. In the last ten years, more and more corporations have addressed human-rights issues directly. The footwear and apparel industry was the first to respond, in part because the marketing for their product depended so heavily on a corporate image. But the movement now reaches well beyond shoes and shirts. The 1995, execution of Ken Saro Wiwa, the Nigerian environmental and democracy activists, galvanized protests around the role of Royal Dutch Shell and other oil companies in the Niger Delta. Shell has since announced a public human rights policy. What the policy means in practice, though, has yet to be seen. But some organizations/companies still lag far behind. While recognizing that corporations are not rights agencies, it believes that the corporate sector has a critical role to play in enhancing respect for universally recognized human rights. A good human rights record is good for business. That is a bottom line we can all agree on.

As drug trafficking has spread around the world, national and international counter-narcotics programmes have also proliferated. In 1995, Human Rights Watch began effort to challenge human rights violations caused by efforts to curtail drug trafficking. HRW presses for the incorporation of human rights consideration into the drug policies. In July 1996, the Human Rights Watch report, "Race and Drug Law Enforcement in the State of Georgia" was released as the first international human rights assessment of any anti-drug policies in the United States. Data analysis of the years 1990 to 1995 revealed that Black residents were arrested for cocaine-related offenses at seventeen times the rate of whites. Black arrested for drug offenses were imprisoned at twice the rate of whites. A black eligible for a

⁵⁸² Formerly known as the Committee for International Academic Freedom, which was established in 1991.

life sentence for drug offenses was five times more likely to receive it than an eligible white.

The defence of the right to free expressions is a major focus of the work of Human Rights Watch. It documents and protests a variety of challenges to this basic right, most commonly used against journalists and members of the political opposition. Human Rights Watch also participated with several coalitions of on-line rights groups to protest Internet censorship agreements by the G-8 countries and the ASEAN nations, and a specific instance of on-line censorship in Germany.

Human Rights Watch administers the Hellman/Hammett grant programme for writers who have been victims of political persecution and are in financial need. The programme gives grants of as much as US\$ 10,000 to writers all over the world. Established in 1989, the estates of Lillian Hellman and Dashiell Hammett fund the grant programme, American writers who were victimized for their political beliefs and associations during the U.S. anti-Communist “witch hunts” of the early 1950s. With this experience in mind, Ms. Hellman left the legacy to provide support for writers who have been persecuted for expressing political views.

Violations of basic human rights are common in prisons and the plight of the great majority of the world’s prisoners pass largely unnoticed. Many countries deny human rights groups access to their penal facilities. Human Rights Watch has conducted specialized prison research and campaigns for prisoner’s rights since 1987, to focus international attention on prison conditions worldwide. Human Rights Watch monitors conditions of detention around the world, pressuring governments to bring their treatment of prisoners into compliance with basic human rights standards.⁵⁸³

6. Amnesty International

In 1961, a London lawyer Peter Benenson read about a group of students in Portugal who were arrested and jailed for raising a toast to “freedom” in a public restaurant. This incident prompted him to launch a one-

⁵⁸³ This is based on the material available on the official web site of Human Rights Watch

year campaign called “Appeal for Amnesty” in the London Observer, a local newspaper. “The Forgotten Prisoners,” was published worldwide on 28th May 1961, and brought in more than 1,000 offers of support for the idea of an international campaign to protect human rights.

Within 12 months the new organization had sent delegations to four countries to make representations on behalf of prisoners, and had taken up 210 cases. Amnesty International members had organized national bodies in seven countries.

Amnesty International has more than 1,000,000 members’ subscribers and regular donors in more than 160 countries and territories. There are more than 5,300 local, youth & student, and professional AI groups registered at the International Secretariat. There are nationally organized sections in 56 countries, 34 of them in Latin America and the Caribbean, Africa, Asia and the Middle East and Central Europe.⁵⁸⁴

The Organization’s nerve centre is the International Secretariat in London, with more than 320 permanent posts and 95 volunteers from more than 50 countries. The Secretary General is Pierre Sane.

A nine-member International Executive Committee (IEC) governs Amnesty International. It comprises eight volunteer members, elected every two years by International Council comprising representatives of the worldwide movement, and an elected member of the International Secretariat.

It is based in London. It has formal relations with the United Nations, UNESCO, The Council of Europe, The Organization of African Unity and The Organization of American States. Amnesty International has specialist networks – groups of medical professionals, lawyers and others – who use their specialist expertise to campaign for victims of human rights violations.

Today an ever-growing human rights constituency is gathering the facts on abuses by governments, taking action to stop them and strengthening the forces necessary to prevent future violations. More than 1,000 domestic and regional organizations are working to protect basic human rights.

⁵⁸⁴ 1.Amnesty International Report 1994, at 352

The object of Amnesty International is to contribute to the observance throughout the world of human rights as set out in the Universal Declaration of Human Rights. In pursuance of this object, and recognizing the obligation on each person to extend to others rights and freedoms equal to his or her own, Amnesty International adopts as its mandate:

- a) To promote awareness of and adherence to the Universal Declaration of Human Rights and other internationally recognised human rights instruments, the values enshrined in them, and the indivisibility and interdependence of all human rights and freedoms;
- b) To oppose grave violations of the rights of every person freely to hold and to express his or her convictions and to be free from discrimination by reason of ethnic origin, sex, colour or language, and of the right of every person to physical and mental integrity, and, in particular; and
- c) To oppose by all appropriate means irrespective of political considerations:
 - (b) The imprisonment, detention or other physical restrictions imposed on any person by reason of his or her political, religious or other conscientiously held beliefs or by reason of his or her ethnic origin, sex, colour or language, provided that he or she has not used or advocated violence (hereinafter referred to a 'prisoners of conscience'); Amnesty International shall work towards the release of and shall provide assistance to prisoners of conscience;
 - (c) The detention of any political prisoner without fair trial within a reasonable time or any trial procedures relating to such prisoners that do not conform to internationally recognized norms;
 - (d) The death penalty, and the torture or other cruel, inhuman or degrading treatment or punishment of prisoners or other detained or restricted persons, whether or not the persons affected have used or advocated violence; and

- (e) The extra-judicial execution of persons whether or not imprisoned, detained or restricted, and 'disappearances,' whether or not the persons affected have used or advocated violence.

In order to achieve the previously mentioned objects and mandate, Amnesty International shall:

- a) At all times make clear its impartiality as regards countries adhering to the different world political ideologies and groupings;
- b) Promote as appears appropriate the adoption of constitutions, conventions, treaties and other measures;
- c) Support and publicize the activities of and cooperate with international organizations and agencies which work for the implementation of the aforesaid provisions;
- d) Take all necessary steps to establish an effective organization of sections, affiliated groups and individual members;
- e) Secure the adoption by groups of member or supporters of individuals prisoners of conscience;
- f) Provide financial and other relief to prisoners of conscience and their dependents and to persons who have lately been prisoners of conscience;
- g) Provide legal aid, where necessary and possible, to prisoners of conscience;
- h) Investigate and publicize the 'disappearance' of persons where there is reason to believe that they may be victims of violations of the rights set out in Article 1 hereof;
- i) Oppose the sending of persons from one country to another where they can reasonably be expected to become prisoners of conscience or to face torture or the death penalty;
- j) Send investigators, where appropriate, to investigate allegations that the rights of individuals under the aforesaid provisions have been violated or threatened;

- k) Make representations to international organizations and to governments whenever it appears that an individual is a prisoner of conscience or has otherwise been subjected to disabilities in violation of the aforesaid provisions;
- l) Promote and support the granting of general amnesties of which the beneficiaries will include prisoners of conscience; and
- m) Adopt any other appropriate methods for securing its object and mandate.⁵⁸⁵

It is due to the concerted efforts of organizations like AI that an increasing body of international human rights agreements holds governments accountable for their action:

- 1) 167 governments are now party to the International Covenant on Civil and Political Rights (ICCPR) and 160 governments are party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), These Covenants require countries ratifying them to recognise or protect a wide range of human rights;
- 2) 114 states are now party to the First Optional Protocol to the International Covenant on Civil and Political Rights. The Protocol establishes procedures allowing both individuals and states to present complaints of human rights violations;
- 3) 75 states are now party to Second Optional to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty;
- 4) 153 governments are now party to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and
- 5) 145 states are party to the Refugee Convention and the Refugee Protocol.

⁵⁸⁵ Amnesty International Report 1994, at 332-3

Part VI
HUMAN RIGHTS IN PAKISTAN

Chapter Twenty-Seven

FUNDAMENTAL RIGHTS IN PAKISTAN

1. Introduction

Pakistan came into existence on 14th August 1947. Its constitutional history is marred by ideological and regional tensions. It was after 9 years of its creation that the nation had in 1956, its first Constitution. The ink on its fragile pages had not yet dried when first martial law was imposed in 1958. The military government introduced its own Constitution in 1962, but it could not provide a viable framework for the actualization of national aspirations and Pakistan was dismembered in 1971.

The present Constitution of the Islamic Republic of Pakistan was promulgated on 12th April 1973, and it was enforced on 14th August 1973. Human Rights are discussed in its Preamble, Introductory Chapter and the special chapters on Human Rights and Principles of Policy. The Preamble enunciates the following fundamental principles, which describe the basic human rights philosophy of the Constitution:

- (b) Sovereignty belongs to Allah Almighty alone, and the authority to be exercised by the people of Pakistan within limits prescribed by Him is a sacred trust;
- (c) The will of the people is that the state shall exercise its powers and authority through the chosen representatives of the people;
- (d) The principles of democracy, freedom, equality, tolerance and social justice shall be fully observed;
- (e) Adequate measures shall be made for the minorities freely to profess and practice their religion and develop their culture;
- (f) Fundamental rights, including equality of status of opportunity, due process of law, social, economic and political justice and freedom of thought, expression, belief, faith, worship and assembly, shall be guaranteed;

- (g) Adequate measures shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;
- (h) Independence of judiciary shall be fully secured;
- (i) The people may make their full contribution towards international peace and progress and happiness of humanity;
- (j) Pakistan would be a democratic state based on Islamic principles of social justice; and
- (k) Egalitarian society to be created through a new order.

The Introductory Chapter of the Constitution guarantees freedom against all forms of exploitation and fundamental right of due process of law.

2. Elimination of exploitation

The State shall ensure the elimination of all forms of exploitation and the gradual fulfilment of the fundamental principle, from each according to his ability, to each according to his work (Article 3). The Pakistani society, being at an early stage of human development, still exhibits many forms of exploitation inherent in the behaviour of the people and the functioning of the institutions. Exploitation is antithesis of the basic human rights values of equality, liberty, fraternity and social justice, which are espoused by the Constitution; hence, the Constitution addresses this issue at the very outset.

The Constitution obliges the state to ensure the gradual fulfilment of the fundamental egalitarian principle: from each according to abilities, to each according to his work. This principle is a modified version of the socialist principle ‘from each according to his ability, to each according to his needs.’

3. Due process of law

It has been declared an inalienable right of every citizen to enjoy the protection of law and to be treated in accordance with law. In particular, no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. No person shall be prevented from or be hindered in doing that which is not prohibited by law.

No person shall be compelled to do that which the law does not require him to do.

This is an old legal concept. Clause 39 of Magna Carta issued in 1215, promised: ‘No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.’ Since then, this doctrine is part of Common Law and all the legal systems flowing out of Common Law.

4. Rights guaranteed

The chapter on Fundamental Rights begins with the declaration that any law, custom or usage, in so far it is inconsistent with the rights conferred by the chapter on Fundamental Rights⁵⁸⁶ shall be void. This declaration makes human rights superior to any other law, custom or usage in force. If they conflict with enumerated rights they will be declared void. However, it mentions certain qualifications to the omnipotence of operation of the section. It means that there are certain exceptions to the generality of the supremacy of fundamental rights.

The state cannot make any law, which takes away or abridges these rights. However, the provisions of this Article will not apply to the members of forces charged with the maintenance of public order for ensuring the proper discharge of their duties or the maintenance of discipline among them.

The limitation imposed by Article 8(2) on promulgation of laws in contravention of fundamental rights other than those enumerated in Article 233(1) is not removed by virtue of imposition of emergency and state cannot make laws in violation of fundamental rights.⁵⁸⁷

The Constitution guarantees the following fundamental rights and freedoms:

1) Right to life and liberty (Article 9)

⁵⁸⁶ Article 7-28 of the 1973 constitution of Pakistan

⁵⁸⁷ Rifat Perveen v Bolan Medical, College PLD [1980] Quetta 10

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| 2) Freedom from illegal arrest | (Article 10) |
| 3) Right to fair trial | (Article 10A) |
| 4) Abolition of slavery | (Article 11) |
| 5) Freedom from retroactivity | (Article 12) |
| 6) Freedom from double jeopardy | (Article 13) |
| 7) Right to dignity and privacy | (Article 14) |
| 8) Freedom of movement | (Article 15) |
| 9) Freedom of assembly | (Article 16) |
| 10) Freedom of association | (Article 17) |
| 11) Freedom of profession | (Article 18) |
| 12) Freedom of expression | (Article 19) |
| 13) Right to information | (Article 19A) |
| 14) Freedom of religion | (Article 20) |
| 15) Protection from religious taxation | (Article 21) |
| 16) Protection of religious education | (Article 22) |
| 17) Right to property | (Article 23) |
| 18) Right to property | (Article 24) |
| 19) Equality before law | (Article 25) |
| 20) Right to education | (Article 25A) |
| 21) Access to public places | (Article 26) |
| 22) Freedom from discrimination in services | (Article 27) |
| 23) Protection of language and culture | (Article 28) |

1) Right to life and liberty

Life or liberty of persons cannot be deprived except in accordance with law.⁵⁸⁸ Liberty has a much wider scope and it means, not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is used to embrace the right of the citizen to be free in the enjoyment of all his faculties, e.g., to live and work where he wills, to earn his living by all lawful calling, to pursue any vocation and for that purpose to enter into any contract.⁵⁸⁹

The right of ‘access to justice,’ a well-recognized inviolable right, is enshrined in Article 9. This is equally found in the doctrine of ‘due process of law.’ It includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal.

Legislature cannot frame such law as may bar right of access to courts of law and justice. Denial of the right of access to courts and justice is infringement of the Article 9. However, a trial of army officers by a court-martial validly constituted under the Pakistan Army Act, 1952, does not raise any question of ‘public importance,’ much less a question regarding enforcement of any of the fundamental rights; Supreme Court, thus, lacks jurisdiction in circumstances.⁵⁹⁰

Any assault on the body of a person, e.g., whipping, torture, blind-folding, fettering, house arrest, solitary confinement, preventing a person from reading a book (religious or non-religious), is an invasion of liberty, and in the absence of a law or rule having the force of law authorizing it, such act would be violative of Article 9.⁵⁹¹

No public functionary or private person may injure or confine a person, unless he has a legal warrant to do so. Where an authority deprives a person, whether a citizen or not, of his liberty in flagrant violation of the law under which it purports to act, the arrest or detention cannot be said to be in accordance with law and the High Court can set such person at liberty.

⁵⁸⁸ Article 9 of the Constitution of Pakistan

⁵⁸⁹ *Allegar V State of Louisiana* (1897) 165 US 578.

⁵⁹⁰ *Shahida Zahir Abbassi v President of Pakistan*, PLD [1996] SC. 632

⁵⁹¹ *Shamim Afridi v Province of the Punjab* PLD [1974] Lah.

However, the Legislature may make laws, which can deprive life or can curtail liberty. Similarly, on the Proclamation of Emergency under the Constitution, the operation of Article 9 may be suspended.

2) Freedom from illegal arrest

The arrested person cannot be detained in custody without being informed of the grounds for such arrest. He shall be given the right to consult and be defended by a legal practitioner of his own choice. He shall be produced within a period of 24 hours before a magistrate who shall decide whether the person shall be detained or released. However, this rule will not apply to any person who is arrested or detained under any law providing for preventive detention.

The law providing for preventive detention can be made to deal with persons acting in a manner prejudicial to the integrity, security or defence of Pakistan or external affairs or public order, or the maintenance of supplies or services.

The person arrested or detained under preventive laws will be produced before the Review Board who after affording him an opportunity of being heard in person will review the case and will decide whether there is a sufficient cause for such detention. The Review Board will consist of the judges of Supreme Court or a High Court.

The detaining authority will inform the detainee within 15 days the reasons/grounds for the detention and shall afford him the earliest opportunity of making a representation against the order. The grounds may not be informed if such authority considers it to be against the public order. The maximum detention period for a person detained for acts prejudicial to public order is 32 months whereas it is 36 months for any other case. However, this will not apply to any person who is employed by, or works for, or acts on instructions received from the enemy or who is acting or attempting to act in a manner prejudicial to the integrity, security or defence of Pakistan.⁵⁹²

⁵⁹² Article 10 of the Constitution

The person arrested must be produced before the nearest magistrate within the time prescribed. Failure to comply with this requirement would make further detention illegal. The person arrested must be informed of the grounds for his arrest within a reasonable time, but not later than fifteen days and the communication should contain enough particulars to enable him to understand the nature of the accusation against him. If no grounds were communicated, the detention would be illegal. The grounds must be sufficiently particularized with facts and information to enable the *detenu* to understand the alleged reason for his arrest.⁵⁹³

The constitutional provision giving to an accused person the right to be defended by counsel must be read as part of the law, irrespective of whether the law gives or denies such right. The provisions of the law, which deny to such person the right to be defended by a legal practitioner, are void.

The ground open to attack the detention is that the order does not relate to any of the matters specified in Article 10(4), namely, ‘acting in a manner prejudicial to the integrity, security or defence of Pakistan or any part thereof, or external affairs of Pakistan, or public order, or the maintenance of supplies or services.’ If none of these objections were available, then the only question that would require determination would be whether the detaining authority satisfied the test, which enabled him to pass the order.

The Chief Justices are under a constitutional obligation to take the necessary steps to constitute the appropriate Boards. Where the case is not placed before the Review Board within the prescribed period, the detention would be illegal. The proceedings before Review Board are *quasi*-judicial in nature and amenable to judicial review by superior courts. Moreover, the judge who is appointed a member of the Review Board is appointed as a *persona designata* and does not function as Court as such.⁵⁹⁴

⁵⁹³ Roshan Bijaya Shaukat Ali Khan v government of East Pakistan PLD [1965] Dacca, 241

⁵⁹⁴ 3.Karishna v The State PLD [1972] SC1

3) Right to fair trial

A new right, ‘right to fair trial’ has been added in 2010.⁵⁹⁵ It means that a person shall be entitled to a fair trial and due process for the determination of his civil rights and obligations or in any criminal charge against him. Various rights associated with a fair trial are explicitly proclaimed in Article 10 of the Universal Declaration of Human Rights and Article 6 of the European Convention of Human Rights, as well as numerous other constitutions and declarations throughout the world.

There is no binding definition of the concept and it includes: (i) presumption of innocence until the accused is proven guilty; (ii) fair and public hearing by an independent and impartial tribunal; (iii) review or appeal by a higher court against conviction or sentence or obligation; (iv) prohibition against double jeopardy; (v) equality before the courts and tribunals; (vi) public hearings; (vii) judgment rendered shall be made public; (viii) hearing within a reasonable time; (ix) right to counsel of choice; (x) right to interpretation and translation etc.

4) Abolition of Slavery

The Constitution declares that the slavery is non-existent. Even if it is existent, it is forbidden. No law can permit or facilitate its introduction into Pakistan in any form. Furthermore, all forms of forced labour are also prohibited; it is true about trafficking in human beings. No child below the age of fourteen years can be engaged in any factory or mine or any other hazardous employment.⁵⁹⁶

These rights, however, will not affect compulsory service by any person undergoing punishment for an offence against any law or required by law for public purpose. As a further safeguard, compulsory service cannot be of a cruel nature or incompatible with human dignity. (For details see chapter ‘Beyond Chains’).

⁵⁹⁵ Article 10A inserted by the Constitution (Eighteenth Amendment) Act, 2010

⁵⁹⁶ Article 11

The Pakistani courts are quite sensitive in respect of protecting the people from slavery or slavery-like practices. In an unusual case where a telegram was received by Chief Justice of Pakistan alleging bonded labour and illegal detention by employers in brick kiln industry, the matter was taken cognizance of for the enforcement of fundamental rights, regarding bonded labour practices (Darshan Masih case).

5) Freedom from retroactivity

No one can be punished for an act or omission that was not punishable by law at the time of the act or omission. Moreover, no person can be punished for an offence by a penalty not prescribed by law for that offence at the time the offence was committed.⁵⁹⁷

The general principle governing the powers of a legislature is that it can make all laws, including retrospective laws operating in the field of substantive laws and procedure. However, the doctrine of unlimited parliamentary sovereignty has no place in a federal system of government functioning under a written Constitution and the power of judicial review extends to executive acts and legislative measures.

There is no fundamental distinction between *ex post facto* and retroactive laws, except that the former is wider and includes procedural legislation, which may require lesser evidence for proof. In American constitutional law, an *ex post facto* law is one which, operating retrospectively on penal or criminal matters only, renders a previous innocent act criminal, aggravates or increases the punishment for a crime, alters the rules of evidence to the prejudice of the accused, penalises an innocent act, deprives an accused of some protection or defence previously available, or otherwise alters his situation to his disadvantage.⁵⁹⁸

However, here in Pakistan Article 12 prohibits convictions and sentences being recorded in the criminal jurisdiction under *ex post facto* laws. The laws providing civil disabilities and disqualification for professions, trades,

⁵⁹⁷ Article 12

⁵⁹⁸ *Calder v Bull* [1798] 1 Law Ed. 648

elections and callings for past acts and omissions may in Pakistan, as in the United States of America, are held *ex post facto*.

6) Freedom from double jeopardy

No person can be prosecuted or punished for the same offence more than once and no one can be compelled to be a witness against himself when accused of an offence.⁵⁹⁹

In the Anglo-American legal system, the principle in Article 13 is stated in the form of the rule against double jeopardy. This Article raises to a constitutional status the principle of *autrefois convict* and *autrefois acquit* embodies in the Code of Criminal Procedure 1898 and Qanoon-e-Shahadat Order 1984 (Law of Evidence).

The Code of Criminal Procedure provides that a person who has once been tried by a competent court for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence,⁶⁰⁰ nor on the same facts for any other offence for which a different charge from the one made against him might have been made⁶⁰¹ or for which he might have been convicted.⁶⁰²

The principle also finds place in a modified form in the General Clauses Act, which provides that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or anyone of those enactments, but shall not be liable to be punished twice for the same offence.⁶⁰³

The rule against self-incrimination as stated in the Qanoon-e-Shahadat Order Order, 1984, is that a witness shall not be excused from answering any question as to any matter in issue in any suit or in any civil or criminal proceedings, upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or

⁵⁹⁹ Article 13 of the Constitution

⁶⁰⁰ Section 403, Code of Criminal Procedure, 1898 (Cr. P C)

⁶⁰¹ Section 236 of Cr. P.C.

⁶⁰² Section 237 of Cr. P.C.

⁶⁰³ Section 26 of The General Clause Act, 1897

forfeiture of any kind.⁶⁰⁴ This rule is subject to the proviso that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, to be proved against him in any criminal proceedings, except a prosecution for giving false evidence by such answer. Thus an accused person is not a competent witness and he cannot be administered an oath, but in some special cases an accused person is a competent witness; through in such cases the laws generally permit him to volunteer evidence and do not compel him to give evidence.⁶⁰⁵

7) Right to dignity and privacy

The dignity of man and privacy of home is inviolable. Furthermore, no one can be subjected to torture for extracting evidence.⁶⁰⁶ This Article embodies within itself the Islamic concept of *pardah*, which is inherent in the concept of the privacy of home.

In a novel case, Supreme Court of Pakistan, on receipt of a letter from the citizens about their apprehension against construction of a grid station by authorities, found that letter raised two questions, namely, whether any government agency had a right to endanger the life of citizens by its actions without the latter's consent and whether zoning laws vest rights in citizens which could not be withdrawn or altered without the citizen's consent. The court observed that a balance should be struck between the rights of the citizens and also the plans which were executed by the authority for the welfare, economic progress and prosperity of the country and if there were threats of serious damage, effective measures should be taken to control it.

The court appointed a commission to examine the plan and the proposals or schemes of the authority in the light of complaint made by the citizens and submit its report and if necessary to suggest any alteration or addition which may be economically possible for construction and location of the grid station. The authority was directed by the court that in future, prior to installing or constructing any grid station and / or transmission line, it would

⁶⁰⁴ Article 132 of the Evidence Order, 1984

⁶⁰⁵ Section 340, Code of Criminal Procedure (Cr. P.C)

⁶⁰⁶ Article 14 of the Constitution

issue public notice in newspapers, radio and television inviting objections and finalize the plan after considering the objections, if any, by affording public hearing to the persons filing objections.⁶⁰⁷

8) Freedom of movement

Every citizen will have the right to remain in, enter and move freely throughout Pakistan and to reside and settle in any part of it. However, law can impose any reasonable restrictions in the public interest.⁶⁰⁸

A citizen's right to step out and step in the country, move freely throughout Pakistan and to reside and settle in any part thereof are subject to reasonable restrictions imposed by law in the public interest. The question whether a law imposed reasonable restrictions on the freedom of movement and residence of a person is justiciable, and in determining this question the court has to look at the nature and extent of the restriction, the manner in which it is imposed, the nature of the right alleged to have been infringed and the underlying purpose of the restriction imposed.⁶⁰⁹

The classes of persons whose freedom of movement and residence has been restricted have been habitual criminals, dangerous persons and persons likely to disturb inter-communal peace and the restrictions have generally taken the form of orders of internment in or externment from particular areas.

9) Freedom of assembly

Every citizen will have the right to assemble peacefully and without arms but law can impose any reasonable restrictions in the interest of public order.⁶¹⁰

The right to freedom of assembly, although fundamental, is not in its nature absolute, as it is subject to reasonable restrictions with necessary conditions to safeguard the public interest. The restrictions imposed must;

⁶⁰⁷ Shehla Zia v WAPDA, PLD [1994] S.C. 693

⁶⁰⁸ Article 15 of the Constitution

⁶⁰⁹ Nawabzada Nasrullah Khan v government of West Pakistan, PLD [1965] Lah. 642

⁶¹⁰ Article 16 of the Constitution

however, be reasonable, and it is for the court to decide in each case whether the restriction questioned is reasonable or otherwise. In deciding this, the court will have to take into consideration the conditions prevailing at the time, nature, extent and duration of the restrictions, and all the surrounding circumstances.⁶¹¹

The expression ‘public order’ is not defined anywhere, but danger to property, human life and safety, and the disturbance of public tranquillity fall within the purview of reasonable restrictions that may be imposed in the public interest to avert such danger or disturbances. Hence, if prevention seems impossible in the circumstances, the assembly may, in the interest of law and order, be directed to disperse. However, the right to free assembly cannot be abridged, merely because some persons threaten to stage a riot or, because peace officers apprehend a breach of the peace.

The laws, which punish members of an unlawful assembly,⁶¹² or otherwise allow the use of force to disperse such assembly,⁶¹³ are not infractions of the right to freedom of assembly, nor are magistrate’s powers under the Code of Criminal Procedure,⁶¹⁴ unconstitutional, if they are exercised in good faith for the protection of public interest.⁶¹⁵

The State may in a proper manner regulate the use of the streets by requiring a permit. Similarly, a District Magistrate may prohibit a public meeting if, in the circumstances, he considers it necessary in the interest of public order.

The right to parade or march in processions flows from the right of free assembly, but here other considerations, e.g., the right of others to use public roads and streets and apprehension of breaches of the peace, intervene and, therefore, in the interest of public order, the law⁶¹⁶ may empower the authorities responsible for the maintenance of law and order to impose

⁶¹¹ Nawabzada Nasrullah Khan, O-. Cited at p. 642

⁶¹² Section 141 and 153 of Pakistan Penal Code, 1860 (PPC)

⁶¹³ Section 127-132 of Cr PC

⁶¹⁴ Section 144

⁶¹⁵ Abdul Hamid Qadri v District Magistrate PLD [1957] Lah. 213

⁶¹⁶ Section 144 of Cr. PC and sections 30 and 31 of the Police Act, 1861

restrictions on the exercise of this right. The reasonableness of such restrictions will have to be construed with reference to the conditions prevailing in the particular locality.

Self-organization, collective bargaining and all other allied labour union activities involve the right of free assembly which may not be conditioned by statute or by previous restraint by injunctive process, but the government may regulate labour unions with a view to protect the public interests without trespassing on the domain set apart for free assembly.

10) Freedom of association

Every citizen will have the right to associations or unions but law in the interests of sovereignty or integrity of Pakistan, public order or morality can impose reasonable restrictions.

Every citizen will have the right to form or be a member of a political party but this right is subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan. If the federal government declares that any political party has been found or is operating in a manner prejudicial to sovereignty or integrity of Pakistan, the federal government, shall, within fifteen days of such declaration refer the matter to the Supreme Court whose decision on such reference will be final.⁶¹⁷

In the United States, the right to freedom of association is not specifically stated as a fundamental right, and is a result of the application of the due-process clause to the right to liberty recognized by the Fourteenth amendment. In Pakistani and Indian Constitutions, however, it is enumerated as a separate right. In Pakistan, an association may take the form of a political party, company, an institute, etc. What a person may legally do alone, he may do with the assistance and cooperation of others.

On the other hand, law may prohibit associations, the object of which is to advocate or carry on some immoral purpose, e.g., gambling, or illegal activity, or overthrowing the government by unlawful means, and such

⁶¹⁷ Article 17 of the Constitution

prohibition will not amount to a denial of the constitutional right to freedom of association.

The question whether a restriction is reasonable or unreasonable is for the court to determine and in determining it, the court has to examine not only the reasonableness of the law itself, but also the reasonableness of the mode of application of the restriction, whether such mode is prescribed by law or not. While construing Article 17, approach of the court need not be narrow and pedantic, but elastic enough to march with the changing times and be guided by the object for which it is embodied in the Constitution.

The Constitution while guaranteeing the right to every citizen to form associations or unions also provides separately ‘to form or be a member of a political party’ as its existence is essential for maintenance of other rights guaranteed to the individuals by the Constitution. Thus, every citizen has a fundamental right to be a member of a political party of his choice.⁶¹⁸

The Election Act, 2017, governs the formation of political parties. Political right or political justice does not end with the election to the Assemblies, but it is an on-going process which starts with the formation of the political parties, participation in the elections and, thereafter, to operate and participate in governance of the country by the majority rule. Any unlawful order, which results in frustrating such activity, by removing such party from office before the completion of its normal tenure, would; therefore, constitute an infringement of fundamental right guaranteed in the Article. Illegal and unconstitutional denial to run the government as long as one enjoys the support of the majority in the House will be the denial of political justice, guaranteed by the Constitution.⁶¹⁹

11) Freedom of profession

Every citizen will have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business but this right is subject to qualifications, if any, as may be prescribed by law. However, this right cannot prevent the regulation of any trade or profession by a licensing

⁶¹⁸ Wahabul Khairi v Federation of Pakistan PLD [1995] Lah. 27

⁶¹⁹ Muhammad Nawaz Sharif v President of Pakistan PLD [1993] S.C.

system; or the regulation of trade, commerce or industry in the interest of free competition therein; or the carrying on, by the Federal Government or a Provincial Government or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.⁶²⁰

In the United States, the right to follow a profession, calling or occupation, or to carry on any trade or business, is inferred from the ‘liberty and property’ provisions of the Fourteenth Amendment to the Constitution of the United States of America, whereas in Pakistan, as well as in India, the exercise of the right is enshrined in the Constitutions and is made subject to reasonable restrictions to be imposed by law.

It seems that the word ‘lawful’ has been intentionally used in Article 18 to indicate the position, though it is somewhat opposed to the conception of fundamental rights, that the legislature may by law, totally or partially, prohibit a trade, business or profession, in the public interest.

The word ‘qualification’ means that which makes any person fit to do a certain act. However, the legislature, on the pretext of prescribing qualifications, cannot impose conditions, which are not related to the fitness or suitability of a person to enter a profession.

The government should, where a monopoly exists, regulate the trade or industry in the interests of free competition in some cases, the public welfare may require limits of the number of persons who may carry on a certain business or of the places where it may be carried on. For instance, in the United States of America, a statute, which had granted exclusive franchise to a Slaughterhouse company, was upheld and the legislature was held clearly to have had the power to enact in the interest of public welfare, a person who should carry on the business.⁶²¹

12) Freedom of expression

Every citizen will have the right to freedom of speech and expression, and there will be freedom of the press but these rights are subject to any

⁶²⁰ Article 18 of the Constitution

⁶²¹ Slaughter House Case, 21, Law Ed. 394

reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court.⁶²²

The liberty to write or speak includes the corresponding right to be silent and also the liberty to decline to write, and such rights, as well as the right of privacy, or the right to speak only when one may speak freely, is insured under Article 19. The right of the citizenry to receive information can be spelt out from the ‘freedom of expression’ guaranteed by this Article subject to inhibitions specified therein and such right must be preserved.⁶²³

Freedom of speech and liberty of press are not absolute and unqualified rights, but are relative i.e., it does not mean that one can talk or distribute where, when and how one chooses. However, there can be no absolute test of the reasonableness of restrictions, and it is for the court to decide whether a restriction in the circumstances of the case should or should not be held to be reasonable. Freedom of expression implies freedom of communication by all lawful means, and freedom to receive the communication.

‘Public order’ includes public safety and speeches likely to affect the public safety will not receive any constitutional protection. The various Public Safety Acts, to the extent that their object is the maintenance of public order, are proper restrictions on freedom of speech. The conceptions of decency and morality, not being static phenomena, have differed not only in different societies, but also in the same society at different times of its social and ethical history. Therefore, questions relating to such matters should be approached in the right of the existing and generally accepted notions.

In Pakistan, the penal law punishes obscene literature and songs⁶²⁴ and lottery offices⁶²⁵ on the ground that the former constitutes an offence against public decency and morals and the latter against public morals. The word

⁶²² Article 19 of the Constitution

⁶²³ Muhammad Nawaz Sharif, op. cited., 473

⁶²⁴ Section 292 and 294 of PPC

⁶²⁵ Section 294 A of PPC

‘obscene’ in these provisions has been held to mean anything expressing or suggesting ideas that are unchaste, lustful, impure, indecent and lewd, or calculated to inflame the passions.

13) Right to information

The free flow of information is must for a democratic society because it helps the society to express and develop. It is now universally recognized that the right to information is vital to democracy for ensuring transparency and accountability in governance. It ensures that governance is participatory. Even otherwise a democratic society or a mankind survives by accepting new ideas, experimenting with them, and rejecting them if found unimportant. Therefore, it is necessary that whatever ideas the government or its other members hold must be freely put before the public.

The right to information is included in UDHR and in International Covenant on Civil and Political rights 1976, that ‘Everyone shall have the right to freedom of expression, the freedom to seek and impart information and ideas of all kind, regardless of frontiers.’

Normally, the Executive carries out its work in secret chambers and people or press hardly have an access or control over it. Some have argued that a government, which functions in secrecy not only, acts against democratic decency, but also busies itself with its own burial. Therefore, a right to know is necessary to handle the affairs related to executive and provides a platform for people to participate in governance with proper knowledge.

Therefore, in 18th Constitutional Amendment passed in 2010, a new Article 19-A was added in 1973 Constitution and the Article guarantees that every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law. In other words, this ‘right to information’ is not absolute but it can be limited and abridged by properly made regulations and the regulation has to be reasonable otherwise it can be challenged in a court of law.

14) Freedom of religion

Every citizen will have the right to profess, practice and propagate his religion but this right is subject to law, public order and morality. Every religious denomination and every sect will have the right to establish, maintain and manage its religious institutions.⁶²⁶

The freedom extends not only to beliefs, but also to religious acts and observances, e.g., modes of worship and rituals.

The right is subject to three important restrictions, viz. law, public order and morality. Therefore, in accordance with the principle that a Constitution should receive liberal interpretation in favour of the citizen, especially with respect to those provisions which were designed to safeguard the freedom of conscience and worship, the words ‘subject to law’ cannot mean that the right to profess, practice and propagate religion may completely be taken away by the law.

The right to freedom to propagate religion has to be exercised subject to the requirements of public order and safety; it does not extend to the activities, which are a crime under the law.

15) Freedom from religious taxation

No person can be compelled to pay any special tax, the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own.⁶²⁷ In contrast to Pakistan, in India, there is complete ban against taxation for promoting any particular religion.⁶²⁸ This freedom is must in the societies that have people from multi faiths, as is the case for Pakistan wherein there are sizeable Christian and Hindu minorities.

⁶²⁶ Article 20 of the Constitution

⁶²⁷ Article 21 of the Constitution

⁶²⁸ Constitution of India, Article 27

16) Protection of religious education

No person attending any educational institution can be required to receive religious instruction, or take part in any religious ceremony, or attend religious worship, if such instruction, ceremony or worship relates to a religion other than his own.

In respect of any religious institution, there shall be no discrimination against any community in the granting of exemption or concession in relation to taxation.

No religious community or denomination can be prevented from providing religious instruction for pupils of that community or denomination in any educational institution maintained wholly by that community or denomination; and no citizen can be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth. Nevertheless, these rights are subject to valid laws (Article 22).

However, these rights cannot prevent any public authority from making provisions for the advancement of any socially or educationally backward class of citizens.⁶²⁹

The donations made to religious institutions may under fiscal statutes be exempted from tax, and where such exemption has been granted the concession will be available to all donors irrespective of the religion to which they belong.

If an educational institution receives aid from public revenues, it cannot refuse admission to a student merely on the ground of his race, religion, caste or place of birth. It may, however, regulate the admission on the ground of other factors, e.g., merits or residence. Fundamental right of admission to educational institutions is available in case of only those institutions, which receive aid from public revenue. Similarly, allocation of seats to various communities, according to their ratio in population, is a valid method for regulating admission to medical colleges.

⁶²⁹ Article 22 of Constitution of Pakistan

Article 22 is not applicable to socially and educationally backward classes, and a public authority may make special provisions for the advancement of any such class of citizens. The government may; therefore, make a regional classification for admission to an educational institution.

17) Right to property

Every citizen has the right to acquire, hold and dispose of property in any part of Pakistan. This right is subject to any reasonable restriction in the public interest, imposed by the Constitution or any other law.⁶³⁰

The term ‘property’ includes an interest in property, like that of a mortgagee or lessee, patents, copyrights and every other thing of exchangeable value.

The right to acquire, hold and dispose of property is subject to reasonable restrictions in the public interest and the question whether a restriction imposed by law is or is not reasonable or in the public interest is for the court to determine. Any law imposing unreasonable restrictions is; therefore, void. Where Summary Military Court had no jurisdiction to order confiscation of property of convicts, order of confiscation was *coram non-judice* and confiscation of property violated Article 23.

18) Property rights

No person can be compulsorily deprived of his property except in accordance with law. No property can be compulsorily acquired or taken possession of except for a public purpose and by the authority of law, which provides for compensation for it; and the law either fixes the amount of compensation or specifies the principles and the manner in which compensation is to be determined and given.

However, the above mentioned rights cannot affect the validity of any law permitting the compulsory acquisition or taking possession of any property for preventing danger to life, property or public health; or any law permitting the taking over of any property which has been acquired by, or come into the

⁶³⁰ Article 23 of the Constitution

possession of, any person by any unfair means, or in any manner, contrary to law, or any law relating to the acquisition, administration or disposal of any property, which is or is deemed to be enemy property or evacuee property under any law (not being property which has ceased to be evacuee property under any law); or any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner.

Similarly, under Article 24, a law can be made providing for the acquisition of any class of property for the purpose of:

- (I) Providing education and medical aid to all or any specified class of citizens; or
- (II) Providing housing and public facilities and service such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens; or
- (III) Providing maintenance to those who, on account of unemployment, sickness, infirmity or old age is unable to maintain it for themselves.⁶³¹

The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, can be called in question in a court.

The state cannot deprive a person of his property merely by executive action; it must show a valid law and compliance with it in support of the action. Hence, laws depriving a person of right to gain livelihood by legal practice are within the ambit of Article 24 and; therefore, invalid.

Article 24(2) imposes constitutional restrictions on the law of eminent domain, i.e., the power of the State to acquire the property of its subject, and deals with only one class of deprivation of property, all other forms of deprivation being governed by Article 24(1).

⁶³¹ Article 24 of the Constitution

The question whether property is being acquired for a public purpose is a justiciable issue, and it is for the court to decide whether the acquisition is for a purpose which may properly be a public purpose, because if the underlying reason for the acquisition is not a public purpose, the acquisition will be invalid.

Although the word ‘compensation’ is not preceded by the adjective ‘just’ as in the Constitution of the United States of America,⁶³² it can only mean full and fair money equivalent of the property.

19) Equality before law

All citizens are equal before law and are entitled to equal protection of law. There shall be no discrimination on the basis of sex alone but it will not prevent the State from making any special provision for the protection of women and children.⁶³³

There is a subtle distinction between ‘equality before law’ and ‘equal protection of law’: the former means that every citizen, whether man or woman, rich or poor, educated or illiterate, Muslim or non-Muslim, stands on an equal footing before law while the latter means that no citizen can be put beyond the pale of law and no bill of outlawry can be passed against him. Thus, equality before law can have no content other than the one, which is compatible with the due maintenance of the guarantee of equal protection of law.⁶³⁴

The rule of equality before the law was enunciated by Dicey as part of his thesis on the rule of law, which in comparison with other contemporary Constitutions was characteristic feature of the Constitution of the United Kingdom. By asserting that under that Constitution all men were equal before the law, what he meant to convey was that all citizens were equally subject to the ordinary law of the land administered by the ordinary courts and that the rule of law in this sense excluded the idea of any exemption of officials or

⁶³² The fifth Amendment

⁶³³ Article 25

⁶³⁴ Brohi, A.K., ‘The Fundamental Law of Pakistan’, Din Muhammad Press, Karachi, 1958, p. 34

others from the duty of obedience to the law which governed other citizens or from the jurisdiction of the ordinary tribunals.⁶³⁵

In Pakistan, every official is under the same responsibility, for every act done without legal justification, as any other citizen, and if he commits a tort, he is liable for it in the ordinary civil courts.⁶³⁶ Similarly, any law made or action taken in violation of principles contained in Article 25 is liable to be struck down. The equality provision of the Fourteenth Amendment to the Constitution of the United States of America forbids the States from denying to any person within their jurisdiction the equal protection of the laws.

Indeed, the right of ‘access to justice’ is an inviolable right enshrined in the Constitution, which is equally found in the doctrine of due process of law. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal. However, without having an independent judiciary, the fundamental rights enshrined in the Constitution will be meaningless and will have no efficacy or beneficial value to the public at large.⁶³⁷

Further, it is a generally accepted doctrine that the ‘equal protection of the laws’ clause permits classification, and all classifications proceed on inequality. Inequality is permissible if the same is based on classification, which in turn must be reasonable and must not be arbitrary. Such classification must be based on a defined criterion and must have a nexus with the objective for which the classification has been necessitated but may not be made with mathematical nicety or scientific exactness.

Generally, the equal protection clause does not forbid discrimination with respect to things that are different. ‘The validity of classification’ says Lord Rottschaefer in his treatise on constitutional law, ‘thus depends on whether the legislature had reasonable grounds for its restriction of the class upon which burdens are imposed or benefits conferred.’⁶³⁸

⁶³⁵ Dicey, ‘An Introduction to the Law of the Constitution’ Macmillan & Co., London, 10th ed. 1959, at p. 193-4

⁶³⁶ Jibendranath Kishore Acharya Choudhry v Province of East Pakistan, PLD, [1957] S.C. Pak 9.

⁶³⁷ Al-Jehad Trust v Federation of Pakistan, PLD [1996] SC 324.

⁶³⁸ Lord Rottschaefer, ‘Constitutional Law’ quoted in Brohi, A.K. op. cited. P. 353

A variety of rights are included in the guarantee of equal protection of the laws. For example;

- (i) As the equality clause does not prohibit different laws for those differently circumstanced, it is not contravened, if, as compared with men, women are assigned a lesser number of seats on a District Board, or reasonable classification on territorial basis is adopted for bye-elections to the same legislative body.
- (ii) Communal electorates do not offend against the article.
- (iii) A university may in preference to one regional language rightly make another language the medium of examination.
- (iv) A scheme reserving seats in a medical college for students from particular areas is a justifiable classification.
- (v) The allocation of seats to various communities according to their ratio in population is a valid method for regulating admission to medical colleges.
- (vi) States can make any special provision under Article 25(3) for protection of women and children and fix quota of seats for women candidates.
- (vii) On one occasion, a lady who appeared to be incapable of conducting a complicated case of inherited property herself, was ordered by Supreme Court to be provided with assistance of a competent experienced lawyer, which assistance would be deemed to be in pursuance of fundamental right contained in Article 25(3).

20) Right to education

The State shall provide free and compulsory education to all children of the age of five to sixteen years, in such manner as may be determined by law. This right to education to all children of the age of five to sixteen years can be exercised in such a manner as may be determined by law. This right to

education has been recently added through 18th constitutional amendment in 2010.

The right to education is recognized as a fundamental human right. According to the International Covenant on Economic, Social and Cultural Rights, the right to education includes the right to free, compulsory primary education for all, an obligation to develop secondary education accessible to all, in particular by the progressive introduction of free secondary education, as well as an obligation to develop equitable access to higher education, ideally by the progressive introduction of free secondary education, as well as an obligation to develop equitable access to higher education, ideally by the progressive introduction of free higher education.⁶³⁹

The right to education also includes a responsibility to provide basic education for individuals who have not completed primary education. In addition to these access to education provisions, the right to education encompasses the obligation to rule out discrimination at all levels of the educational system to set minimum standards and to improve quality of education.

Similarly, this right is guaranteed in the Universal Declaration of Human Rights, UNESCO Convention against Discrimination in Education and Convention on the Elimination of All Forms of Discrimination Against Women and the European Convention on Human Rights.

The term, 'education' is normally used or formal institutional instructions. However, the 1960 UNESCO Convention against Discrimination in Education defines education in Article 1(2) as: 'all types and levels of education, (including) access to education, the standard and quality of education, and the conditions under which it is given.'⁶⁴⁰ In a wider sense education may describe 'all activities by which a human group transmits to its descendants a body of knowledge and skills and a moral code which enable the group to subsist.' In this sense education refers to the transmission to a subsequent generation of those skills needed to perform

⁶³⁹ Article 13 and 14

⁶⁴⁰ Beiter, Klaus dieter (2005). 'The Protection of the Right to Education by International Law, The Hague: Martinus Nijhoff. P. 19. ISBN 90-04-14704-7

tasks of daily living, and further passing on the social, cultural, spiritual and philosophical values of the particular community.⁶⁴¹ Education means the ‘entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capabilities, attitudes, aptitudes and knowledge.

The right to education can be assessed using the 4 As criterion, which asserts that for education to be a meaningful right, it must be available, accessible, acceptable and adaptable. The former UN Special Rapporteur on the Right to Education, Katarina Tomasevski, developed this criterion. The 4 As are as follows:

- I. Availability: funded by governments, education is universal, free and compulsory. There should be proper infrastructure and facilities in place with adequate books and materials for students. Buildings should meet both safety and sanitation standards, such as having clean drinking water. Active recruitment, proper training and appropriate retention methods should ensure that enough qualified staff is available at each school.
- II. Accessibility: all children should have equal access to school services regardless of gender, race, religion, ethnicity or socio-economic status. Efforts should be made to ensure the inclusion of marginalized groups including children of refugees, the homeless or those with disabilities. There should be no forms of segregation or denial of access to any students. This includes ensuring that proper laws are in place against any child labour or exploitation to prevent children from obtaining primary or secondary education. Schools must be within a reasonable distance for children within the community, otherwise transportation should be provided to students, particularly those that might live in rural areas, to ensure ways to school are safe and convenient. Education

⁶⁴¹ Article 1(a) of UNESCO’s 1974 Recommendations concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms.

should be affordable to all, with textbooks, supplies and uniforms provided to students at no additional costs.

- III. **Acceptability:** the quality of education provided should be free of discrimination, relevant and culturally appropriate for all students. Students should not be expected to conform to any specific religious or ideological views. Methods of teaching should be objective and unbiased and material available should reflect a wide array of ideas and beliefs. Health and safety should be emphasized within schools including the elimination of any forms of corporal punishment. Professionalism of staff and teachers should be maintained.
- IV. **Adaptability:** educational programmes should be flexible and able to adjust according to social societal changes and the needs of the community. Schools should respect observance of religious or cultural holidays in order to accommodate students, along with providing adequate care to those students with disabilities.

The fulfilment of the right to education on a national level may be achieved through free and compulsory education, or more specifically free compulsory primary education, as stated in both the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The Constitution of Pakistan follows this model; hence makes education free and compulsory from the age of 5 (five) to 16 (sixteen) and the details of the education have to be prescribed by law.

21) Access to public places

There can be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth in respect of access to places of public entertainment or resort. This right does not extend to the places intended for religious purposes only. However, this right will not prevent the State from making any special provision for women and children.⁶⁴² It means that all citizens have equal rights in respect of access to places of public entertainment or resort and no one would be barred.

⁶⁴² Article 26

22) Freedom from discrimination in services

No citizen can be discriminated against in respect of any appointment on the ground only of race, religion, caste, sex, residence or place of birth if he is otherwise qualified for appointment in the service of Pakistan. However, certain posts may be reserved for a period not exceeding forty years from the commencing day (i.e., 12th April 1973) for persons belonging to any class or area to secure their adequate representation in the service of Pakistan. Furthermore, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions, which cannot be adequately performed by members of the other sex.⁶⁴³

This section intends to afford fair protection to the people belonging to different languages or cultures. They are entitled to preserve entry on the basis of race, religion, and caste or domicile as was done under apartheid in South Africa. The state shall intervene to protect women and children who normally are in a disadvantageous position e.g., certain areas or periods may be fixed for women or children.

These rights explain the principle of equal opportunities i.e., equal citizen will have equal opportunities and there shall be no discrimination based on religion, race, sex and caste etc. However, state as a guardian of disadvantaged class may fix quota for certain classes or areas. For example in federal services, quota has been fixed for people of different provinces. Furthermore, in most of the departments, 2% seats are reserved for disabled people or nursing profession is declared the domain of women. This is a positive discrimination to give an advantage to the people of less privileged areas or segments of society. The quota system was originally planned for 20 years to be expired in 1993, but the Federal Government extended its operation for another 20 years.

⁶⁴³ Article 27 of the Constitution

23) Languages and culture

Any section of citizens having a distinct language, script or culture has the right to preserve and promote the same and subject to law, establish institutions for that purpose.⁶⁴⁴ This is subject to the operation of Article 251. Under this Article, Urdu has been declared the National language of Pakistan and arrangements shall be made for its being used for official and other purposes.

In addition, without prejudice to the status of the National language, a Provincial Assembly may, by law, prescribe measures for the teaching, promotion and use of provincial languages. Such measures can be taken to promote local languages, scripts or cultures and state can establish special institutions for that purpose.

⁶⁴⁴ Article 28 of the Constitution

Chapter Twenty-Eight

PRINCIPLES OF POLICY IN PAKISTAN

1. Introduction

The Principles set out in Chapter Two of the Constitution of Pakistan are called the Principles of Policy. It is the responsibility of each organ and authority of the state, and each person performing functions on behalf of an organ or authority of the state, to act in accordance with these Principles in so far as they relate to the functions of the organ or authority. However, the observance of these Principles is subject to the availability of resources.

The President in relation to the affairs of the Federation, and the Governor of each Province in relation to the affairs of his Province, shall cause to be prepared and laid before the National Assembly or the Provincial Assembly a report on the observance and implementation of the Principles of Policy.⁶⁴⁵

The Principles themselves are not rules of law. Their true position has been determined by the Constitution⁶⁴⁶ itself, which provides that the responsibility of deciding whether any action of an organ, authority or an official is in accordance with the Principles of Policy is that of the organ or authority, or of the person concerned. In other words, these Principles of Policy in contrast with the Fundamental Rights discussed in the previous chapter are not mandatory or justiciable but are only of recommendatory nature.

2. Over view

Articles 31 to 40 deal with the following substantive Principles of Policy:

- 1) Promotion of Islamic way of life (Article 31)

⁶⁴⁵ Article 29 of the constitution of Pakistan

⁶⁴⁶ Article 30

- 2) Promotion of local governments (Article 32)
- 3) Discouraging prejudices (Article 33)
- 4) Ensuring full participation of women (Article 34)
- 5) Protection of marriage and family (Article 35)
- 6) Protection of rights of minorities (Article 36)
- 7) Promotion of social justice (Article 37)
- 8) Promotion of well-being of people (Article 38)
- 9) Participation in Armed forces (Article 39)
- 10) Strengthening bonds with world (Article 40)

1) Islamic way of life

The government will take steps to enable the Muslims of Pakistan to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Quran and Sunnah.

The state have to endeavour, as expect the Muslims of Pakistan, to make the teaching of the Holy Quran and Islamiat compulsory, to encourage and facilitate the learning of Arabic language and to secure correct and exact printing and publishing of the Holy Quran; to promote unity and the observance of the Islamic moral standards; and to secure the proper organization of Zakat, Ushr, Auqaf and mosques.⁶⁴⁷

2) Promotion of local governments

The state has to encourage local government institutions composed of elected representatives of the areas concerned and in such institutions special representation will be given to peasants, workers and women.⁶⁴⁸

Pakistan has a three-tier system of government: federal, provincial and local. For urban areas, there are Metropolitan Corporations, Municipal

⁶⁴⁷ Article 31

⁶⁴⁸ Article 32

Corporations, Municipal Committees and Town Committees, whereas for rural areas, there are District Councils and Union Councils. This is a very elaborate system but their powers and functions are limited.

In 18th Constitutional amendment, a new substantive Article has been added now in the Constitution. It reads: ‘Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments. Elections to the local governments shall be held by the Election Commission of Pakistan.’

3) Discouraging prejudices

The State shall discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens.⁶⁴⁹

All these primary loyalties and identities need to be curbed in modern democratic and egalitarian societies that are based on merit and fairness instead of old personal loyalties.

Pakistan is a federation consisting of many provinces; it has many races; many areas still have tribal structures; there are many sects; hence, this Articles draws our attention to a dire necessity to curb all such parochial prejudices and promote merit.

4) Encouraging full participation of women

Steps shall be taken to ensure full participation of women in all spheres of national life.⁶⁵⁰

Separate ministries have been established at Federal and Provincial levels to work for the full participation of women in national life. Nevertheless, women are underrepresented in all spheres of national life.

5) Protection of marriage and family

The State shall protect the marriage, the family, the mother and the child.⁶⁵¹

⁶⁴⁹ Article 33

⁶⁵⁰ Article 34

⁶⁵¹ Article 35

6) Protection of rights of minorities

The State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services.⁶⁵²

7) Promotion of social justice

The State shall promote, with special care, the education and economic interests of backward classes or areas; remove illiteracy and provide free and compulsory secondary education within minimum possible period; make technical and professional education generally available and higher education equally accessible to all on the basis of merit; ensure inexpensive and expeditious justice; make provision for securing just and humane conditions of work, ensuring that children and women are not in vocations unsuited to their age or sex, and for maternity benefits for women in employment; enable the people of different areas through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities, including employment in the service of Pakistan; prevent prostitution, gambling and taking of injurious drugs, printing, publication, circulation and display of obscene literature and advertisements; prevent the consumption of alcoholic liquor otherwise than for medicinal and, in the case of non-Muslims, religious purposes; and decentralize the Government administration so as to facilitate expeditious disposal of its business to meet the convenience and requirements of the public.⁶⁵³

The principles of policy contained in Article 37 can be invoked in aid of the provisions of other Articles. In other words, the provisions of the Article are not directly enforceable, but are enforceable indirectly as an aid in interpretation of other provisions of the Constitution and of legislation.⁶⁵⁴

Once an action is taken or an organ or authority of the State promulgates a law in pursuance of Article 37, it is that action or that law

⁶⁵² Article 36

⁶⁵³ Article 37

⁶⁵⁴ *Zohra v Government of Sind*, PLD (1996) Kar. 1

only, which must be examined to see whether any right has thereby been created in any person.⁶⁵⁵

8) Promotion of well-being of the people

The State shall secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants; provide for all citizens, within the available resources of the country, facilitate for work and adequate livelihood with reasonable rest and leisure; provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means; provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment; reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan; and eliminate *riba* as early as possible.⁶⁵⁶

The provisions of Article 38 are not directly enforceable, but are enforceable indirectly as an aid in interpretation of other provisions of the Constitution and of legislation.⁶⁵⁷

9) Participation in Armed Forces

The State shall enable people from all parts of Pakistan to participate in the Armed Forces of Pakistan.⁶⁵⁸ This was necessitated due to the fact that the Punjab dominated Pakistan Army and the other Provinces especially Sind and Baluchistan were poorly represented. Since the promulgation of the Constitution quarter a century ago, the situation is improving slowly.

10) Strengthening bonds with world

⁶⁵⁵ *ibid*

⁶⁵⁶ Article 38 of the Constitution

⁶⁵⁷ J.J. Tajak v government of Baluchistan [1993]S.C. 445

⁶⁵⁸ Article 39

The State shall endeavour to preserve and strengthen fraternal relations among Muslim countries based on Islamic unity, support the common interest of the peoples of Asia, Africa and Latin America, promote international peace and security, foster goodwill and friendly relations among all nations and encourage the settlement of international disputes by peaceful means.⁶⁵⁹

⁶⁵⁹ Article 40



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